

66006-3

66006-3

NO. 66006-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MILORD GELIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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2011 JUN 14 PM 5:59
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A. ISSUES

1. Whether jurors were properly instructed that they did not need to be unanimous to answer "no" on the special verdict forms.

2. Whether State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), does not apply where the special verdict relates to a statutory aggravating factor.

3. Whether Gelin waived any claim under Bashaw by failing to object to the special verdict instruction in the trial court.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Milord Gelin was charged by amended information with Burglary in the First Degree (Count I), Attempted Murder in the First Degree (Count II), Assault in the First Degree (Count III), and Theft of a Motor Vehicle (Count IV). A domestic-violence allegation was attached to each of these crimes. Counts I-III carried two additional allegations: 1) that Gelin was armed with a deadly weapon (hammer) when he committed these crimes, and 2) that the crimes involved domestic violence and were committed within sight or sound of the victim's minor child (under 18)

(aggravated domestic violence). The victim of these crimes was Gelin's former girlfriend, Laurie Williams. CP 1-10, 23-26, 66-69.

A jury found Gelin guilty of all of these crimes except attempted murder. CP 137. The jury further found that Gelin was armed with a deadly weapon when he burglarized Williams's home and assaulted her, and that these two crimes were aggravated domestic violence crimes. CP 138-39.

Gelin's standard range for the first-degree assault conviction (the highest of the three convictions), including the deadly-weapon enhancement of 24 months, was 144-184 months. CP 157. The State recommended an exceptional sentence of 240 months. RP¹ (9-3-10) 8; CP 140-50. The trial court, noting that this was the most egregious first-degree burglary that the court could conceive of, and finding nothing in mitigation of Gelin's crimes, imposed an exceptional sentence of 300 months. RP (9-3-10) 40-44; CP 159, 173-74.

¹ The verbatim report of the trial proceedings consists of seven consecutively-paginated volumes, which will be referred to herein simply as "RP" followed by the page number. The sentencing hearing, held on September 3, 2010, is paginated separately, and will be referred to as "RP (9-3-10)" followed by the page number.

2. SUBSTANTIVE FACTS

Sometime between 3:00 and 3:30 a.m. on October 12, 2009, Laurie Williams awoke from a sound sleep to find a man sitting on her bed; he had a stocking or something similar over his face, and she did not recognize him. RP 163-64, 258, 338-39, 395, 405. The man said nothing to her. RP 339.

Williams leaped out of bed toward the window, and started screaming as loudly as she could. RP 339-40. She was hit several times on the head with some sort of object. RP 340. She was hit on the mouth and the torso with what she believed was a hammer; she also sustained injuries to her hand and arm as she tried to block the blows and protect her head. RP 340-46.

Several neighbors heard Williams screaming, and one yelled out that 911 had been called. RP 164, 295, 343, 395-96. T.W., Williams's 14-year-old daughter, was also awakened by her mother screaming for help and yelling that someone was trying to kill her. RP 249, 258. When T.W. reached her own bedroom doorway, she saw Milord Gelin, her mother's former live-in boyfriend, running down the hall toward her from her mother's bedroom. RP 249-53, 259.

Responding police found a large hole in the wall between the attached garage and the downstairs bathroom where the drywall had been removed. RP 168-69, 186-87, 265, 349. Williams and T.W. identified a jacket found on the living room floor as Gelin's; DNA evidence corroborated this. RP 264, 348-49, 409, 237-39.

Williams's bedroom had blood on the walls, on an overturned table, and around the window. RP 200-01, 214-15, 261, 408, 430-32. There was a piece of white cable and a section of seatbelt approximately 5'10" long on the bed.² RP 198, 210-12, 266-67. Gelin's fingerprint was found on a doorknob on the hallway side of the front bedroom, and his palm print was found on a second-floor window.³ RP 734, 738-39.

Shortly after the attack, while police were still at the house, Gelin called T.W. on her cell phone. RP 267. He seemed angry, upset, and frantic. Id. He said that he knew he was going to jail. RP 268. T.W. handed the phone to a police officer, who spoke

² Gelin stole Williams's Mitsubishi Montero from the driveway that night; when the car was recovered, the seatbelts had been cut out of it. RP 350-51, 357-58, 818, 837-38.

³ Williams and her daughter had moved into their present home after Williams had broken off her relationship with Gelin; he had never lived in the home, although he had visited once for a few minutes to pick up his son. RP 253-54, 316-18, 332-33.

briefly with Gelin. RP 268-69, 593-94. Gelin told the officer that he was going to a hotel, but that he would come and talk to police in the morning. RP 594-95.

Williams, who was injured and bloody, was taken to the emergency room. RP 179-82, 265-66, 296-97, 350, 407, 512-13, 625, 629-30. Photos taken at the hospital showed several bruises that were circular in shape, and about the size of a quarter or a half-dollar. RP 525, 527-28, 530, 534, 543. Medical personnel consistently described the injuries as circular or hemispherical, and agreed that the wounds were consistent with Williams having been struck with a hammer. RP 466, 469-70, 631-32, 639, 756. The emergency-room physician described the wounds to Williams's hand, forearm and armpit as defensive in nature and inflicted with such force that, had they landed on Williams's head, they would likely have been fatal. RP 634, 672.

Gelin was apprehended at a bus station in Eugene, Oregon two days later by federal marshals. RP 710-12, 722. Gelin told the marshals, "I know I'm going to prison, but she broke my heart." RP 716, 724.

Gelin testified in his own behalf. He said that he went over to Williams's house on October 12th to get his tools.⁴ RP 814. He went at 3:00 a.m. because he knew Williams did not want him coming to her home, and he thought that she would not see him at that time. RP 816-18. He went into the Mitsubishi Montero to locate the garage-door opener that was kept in the car, and he used the opener to get into the garage. RP 820. He looked through a number of boxes in the garage and found some items of clothing and toys that belonged to himself and his son. RP 822-23. He claimed that he took the seatbelt from the Mitsubishi so that he could use it to tie up a box. RP 840.

In addition to tools, Gelin said that he was looking for his important papers, including insurance papers and his passport. RP 833, 842. He did not find his papers in the garage, so he entered the house. RP 833-34. He broke through the garage wall into the house because the door was locked. RP 825. Gelin said that he used his hands and feet to break through the sheetrock. RP 826, 829-32.

⁴ Williams testified that she did not have anything at her new home that belonged to Gelin, and that he had never mentioned any items that he needed to pick up. RP 320-21, 331.

When Gelin did not find his important documents downstairs, he went upstairs to Williams's bedroom, where he believed that he would find them in a box under the bed. RP 841-43. Williams woke up when Gelin tried to retrieve the box. RP 849. Frightened, she jumped out of bed and fell to the floor. RP 849-50. She opened the window and began to scream. RP 850. When Gelin tried to explain, Williams pushed him against the wall. RP 850. Gelin "held her very strongly" so that she would not open the window any wider. RP 850-51. He was frightened, and only wanted to leave. RP 851.

Gelin said that, while Williams was trying to hold him against the wall, she fell on a table and "bounced really hard."⁵ RP 855. Gelin denied ever striking Williams, or hitting her with a hammer. RP 855. He insisted that he never had a hammer in his possession that night. RP 834-35, 855.

⁵ The emergency-room physician said that the wheels on the table were not consistent with the circular sites of impact on Williams's body. RP 645-48.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE SPECIAL VERDICTS.

While Gelin concedes that the trial court properly instructed the jury that they need not be unanimous to answer "no" on the special verdict forms, he nevertheless contends that other instructions given by the court conflicted with these proper instructions, and that the instructions as a whole were unclear. He thus claims a right, under the decision in State v. Bashaw,⁶ to reversal of the jury's findings on the deadly weapon allegation and the domestic violence aggravating factor as to his burglary and assault convictions.

Gelin tries to stretch the holding of Bashaw too far. The court in Bashaw held that it was error to instruct jurors that they must be unanimous to answer "no" to the special verdict. None of the court's instructions in this case contained this error. This claim should be rejected.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the

⁶ 169 Wn.2d 133, 234 P.3d 103 (2010).

case and, when read as a whole, properly inform the jury of the applicable law. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The appellate court will review the adequacy of jury instructions *de novo*, as a question of law. State v. Clausing, 147 Wn.2d 620, 627, 56 P.3d 550 (2002).

In State v. Bashaw, 169 Wn.2d 133, 234 P.3d 103 (2010), the supreme court held that "a nonunanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt." Id. at 148. "Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding." Id. at 147 (internal citation omitted) (italics in original). Accordingly, the court found that the trial court had erred in instructing the jury that unanimity was required for a determination of either "yes" or "no." Id.

The trial court in Bashaw had explicitly instructed the jury that they had to be unanimous to return any answer to the special verdict: "Since this is a criminal case, *all twelve of you must agree on the answer to the special verdict.*" Bashaw, 169 Wn.2d at 139 (italics added). Here, by contrast, the jury was instructed in accordance with the holding of Bashaw:

You will also be given special verdict form 1 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 1. If you find the defendant guilty of this crime, you will then use special verdict form 1 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."

CP 128 (Instruction No. 44) (italics added).⁷

Gelin nevertheless argues that *other* instructions conflicted with the special verdict instructions, and might have confused the jury in his case. He relies first on Instruction No. 48 (CP 132), which instructed the jury on the elements of the domestic violence aggravator:

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:

⁷ The court gave a similar instruction for special verdict form 3, to be used upon conviction of Assault in the First Degree. CP 130 (Instruction No. 46).

- (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.

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.

CP 132 (Instruction No. 48).

Recognizing that this instruction *does not* tell the jury that they must be unanimous to answer "no" to the special verdict forms, Gelin contends that the instruction "implied" that unanimity was required, in violation of Bashaw. If this were the only instruction on this subject, Gelin might have a better argument. But in light of the explicit directives in Instructions 44 and 46 (CP 128, 130), that jurors "must" answer "no" on the special verdict forms *if they could not agree*, Gelin's alleged "implication" cannot render the instructions erroneous.

Gelin's reliance on Instruction No. 43 (CP 124-27) is even less persuasive. This instruction went through each charged crime in order, including all of the lesser included crimes on which the court had instructed the jury. CP 125-27. There was no mention of the special verdict forms in this instruction. The concluding paragraph of that instruction included the following statement: "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." CP 127 (italics added).

This instruction refers explicitly to the crimes charged, not to the special verdict. In light of Instructions 44 and 46, which referred explicitly to the special verdicts and properly instructed the jury that they need not be unanimous to answer "no" to those special verdicts, there is no reasonable likelihood that Instruction No. 43 confused the jury as to their obligations under the law.⁸

⁸ Even if this instruction could be deemed erroneous, any error was invited. Defense began the final paragraph of its proposed concluding instruction with: "Because this is a criminal case, *each of you must agree for you to return a verdict*." CP 65 (italics added). This instruction omitted the trial court's language limiting the unanimity requirement to a "count" or "offense." See CP 127.

2. THE RULE ANNOUNCED IN BASHAW DOES NOT APPLY TO THE STATUTORY DOMESTIC VIOLENCE AGGRAVATOR.⁹

The jury in Gelin's case found that both the burglary and the assault were aggravated domestic violence offenses. CP 138, 139. This aggravating factor is set out in RCW 9.94A.535(3)(h). That statute specifies that the jury should determine the necessary facts using the procedures set out in RCW 9.94A.537. Those procedures are, in pertinent part: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor *must be unanimous*, and by special interrogatory."¹⁰ RCW 9.94A.537(3) (italics added).

The supreme court will defer to the legislature's policy judgment with respect to the exceptional sentence procedures. State v. Davis, 163 Wn.2d 606, 614-15, 184 P.3d 639 (2008). The legislature has made it clear that the policy justification for the common-law rule discussed in Bashaw does not apply to statutory aggravating circumstances imposed under RCW 9.94A.535.

⁹ The State recognizes that this Court rejected this argument in State v. Ryan, 2011 WL 1239796 (Div. I, April 4, 2011) at *2-*3, but nevertheless makes the argument here to preserve it for further review.

¹⁰ By contrast, the statute establishing the school bus stop sentencing enhancement at issue in Bashaw, RCW 69.50.435, is silent as to whether the jury must be unanimous to answer "no" to the special verdict.

The Bashaw court believed that the costs and burdens of conducting a second trial on a sentencing enhancement outweigh the State's interest in imposing an additional penalty on a criminal defendant. 169 Wn.2d at 146-47. But the legislature has indicated that, with respect to the statutory aggravating circumstances, imposition of an appropriate exceptional sentence is more important than any concern for judicial economy or costs. When such an exceptional sentence is reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating circumstance alone. RCW 9.94A.537(2).

This policy judgment is not surprising, because exceptional sentences are reserved for the worst offenders. While the Bashaw court characterized the school bus zone enhancement imposed in that case as simply "an additional penalty" upon a defendant "already subject to a penalty on the underlying substantive offense," Bashaw, 169 Wn.2d at 146-47, a trial court has the discretion to impose a sentence up to the statutory maximum when the jury has found a statutory aggravating circumstance. The common law rule applied in Bashaw does not apply to statutory aggravating circumstances such as the one found by the jury in Gelin's case.

3. GELIN WAIVED ANY CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION BY FAILING TO OBJECT BELOW.¹¹

Gelin waived the right to challenge the special verdict instruction by failing to object at trial. To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995). The purpose of requiring objections or exceptions is "to afford the trial court an opportunity to know and clearly understand the nature of the objection" so that "the trial court may have the opportunity to correct any error." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976).

The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c). By failing to object to the special verdict instruction at trial, Gelin deprived the trial court of the opportunity to correct any alleged errors and waived his right to challenge the instruction on appeal.

An instructional error may nevertheless be raised for the first time on appeal if it is a "manifest error affecting a constitutional

¹¹ The State recognizes that this Court rejected this argument in State v. Ryan, 2011 WL 1239796 (Div. I, April 4, 2011) at *2, but nevertheless makes the argument here to preserve it for further review.

right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). To obtain review, a defendant must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). Actual prejudice requires the defendant to make a plausible showing that the alleged error had "practical and identifiable consequences in the trial of the case." Id.

Instructional errors are not automatically deemed manifest constitutional errors. Id. at 103. 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, 159-64, 248 P.3d 103 (2011).¹² Like the defendant in Nunez, Gelin 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. See Nunez, 160 Wn. App. at 159-60.

¹² But see State v. Ryan, 2011 WL 1239796 (Div. I, April 4, 2011).

Gelin rests his claim on Bashaw, despite its lack of constitutional underpinnings. In Bashaw, the court explicitly based its holding on common-law and policy considerations. 169 Wn.2d at 146-47, 146 n.7. The Bashaw court explicitly stated that its holding was "not compelled by constitutional protections against double jeopardy . . . but rather by the common law precedent of this court." Id. at 146 n.7. The court further noted that "several important policies" justified the common-law rule, including judicial economy and finality. Id. at 146-47. Gelin cannot rely on Bashaw to demonstrate an error of constitutional magnitude.¹³

Gelin does not even attempt to show that the claimed error resulted in actual prejudice, the second element required to obtain review under RAP 2.5(a)(3). The special verdict instruction explicitly told the jurors that they need not be unanimous to answer "no." Nor did any other instruction contradict this correct instruction. Unlike other instructions deemed to have resulted in manifest constitutional error, this instruction did not direct the verdict, shift the burden of

¹³ The fact that the court in Bashaw, and the earlier decision on which it relied, State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), considered the jury unanimity issue for the first time on appeal, does not absolve Gelin of his duty to make the required showing in this case under RAP 2.5(a)(3). Neither Bashaw nor Goldberg discussed RAP 2.5(a)(3), and it is unclear whether the issue was ever raised in those cases.

proof, fail to require jury unanimity to convict, or omit an element of the crime charged. O'Hara, 167 Wn.2d 103.

Under these circumstances, Gelin waived any challenge to the special verdict instruction by failing to object to it below and by failing on appeal to make an affirmative showing that the alleged error was of constitutional magnitude and resulted in actual prejudice.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Gelin's exceptional sentence.

DATED this 13th day of June, 2011.

Respectfully submitted,

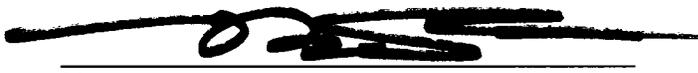
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Maureen M. Cyr**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. MILORD GELIN**, Cause No. **66006-3-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

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