

COURT OF APPEALS OF THE STATE OF WASHINGTON
STATE OF WASHINGTON
2012 AUG -9 AM 11:35

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

STATE OF WASHINGTON)	
Plaintiff,)	COA No. 67509-5-I
)	
VS.)	STATEMENT OF ADDITIONAL GROUND
)	FOR REVIEW RAP 10.3 (d)
DARA KHANN)	
Defendant,)	
)	

I. IDENTITY OF MOVING PARTY:

Appellant, Dara Khann per CR 15(a); RAP 1.2(a) (c); Due Process; equal protection; and in the interest of justice, the Appellant herein submits this Statement of Additional Grounds For Review.

II. OPENING STATEMENT:

I, Appellant, Dara Khann, am expressingly this Court that the errors alleged for each argument presented in my appeal are violations of the State and Federal Constitutions. Namely, the Fifth, Sixth, Eight, Ninth, 10th, and 14th Amendments of the U.S. Constitution; Article I, Section 1, 2, 3, 4 5, 9, 12, 14 21, 22, 29, 30, and 32 of the Washington State Constitution. For all claims presented herein, I am asserting that these

protections have been violated.

Since I am a laymen of the law, proceeding Pro Se, I ask this Court to give these pleadings liberal interpretation and to hold them to less stringent standards than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519 (1972); See Also, Estelle v. Gamble, 429 U.S. 97 (1976); Maleng v. Cook, 4909 U.S. 488 (1989); RAP 1.2 (a)(e).

Because I was my final extension of time I was forced to omit essential arguments from this brief, including my Gunwall, analysis, thus, denying me greater protection under our State Constitution (See State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986)). I had to rush the preparation of this brief and I apologize for any errors that may lie herein.

III. ASSIGNMENT OF ERROR:

1. Whether the trial court is erred in instructing the jury that they must be unanimous in order to answer "no" on the special verdict forms?

2. Whether the trial's counsel was ineffective in failing to object to instructions improperly requiring the jury to be unanimous to answer "no" on the special verdicts?

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court error by instruction incorrect of the law of unanimous jury in a special finding for a sentence

enhancement?

2. Did the trial' counsel failed to objection the trial's court to instruction in unanimous jury instruction that the Washington's Supreme Court had held in State v. Bashaw, 169 Wn.2d at 145, is violation Khann's ineffective assistance of counsel?

V. STATEMENT OF THE CASE:

Because appellant is time restriction, only the relevant facts pertaining to each argument and assignments of error are presented. Appellant generally agree with the Statements of the case as presented by Mr. Eric J. Nielsen, Esquire in the Appellant's Brief and Appellant adopt and incorporate it herein by reference. Mr. Neilsen has fairly developed this section and Appellant compelled per RAP 10.3(d) not to duplicate his work.

VI. ARGUMENT AND AUTHORITIES:

1. The trial court erred in instruction the jury htat that they must be unanimous in order to answer "no" on the special verdict forms.

The State charged Appellant's Dara Khann with commission of the offenses while armed with a firearm. CP 167-171. The trial court provided the jury with special verdict forms regarding the firearm enhancement. Id.

The court also instruction the jury in Instruction 64:

" In order to answer the special verdict forms "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 167-171 (Emphasis added).

Under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), this instruction was error. In Bashaw, Bashaw was charged with three counts of delivery of a controlled substance based on three separate sales to a police informant. Bashaw, 169 Wn.2d at 137. The State sought sentence enhancement, 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 charged 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.*

The Court held the jury need not be unanimous in a special finding for a sentence enhancement: "A non-unanimous 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. 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.*

The same error that occurred in Bashaw also occurred in this case. The jury was instructed that all twelve of them must agree in order to answer the special verdict forms and that they must be unanimous in order to answer "no" on the forms. CP 167-171. Because it is impossible to discern what the jury might have found if properly instructed, the sentence enhancements must be vacated. Bashaw, 169 Wn.2d at 148.

2. Trail's counsel was ineffective in failing to object to instructions improperly requiring the jury to be unanimous to answer "no" of the special verdicts.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L.Ed.2d 674, 104 S.Ct.2052 (1984)), Cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 22, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that the received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

In this case, defense counsel's failure to object to improperly special verdict instructions constitutes ineffective assistance of counsel. Washington requires unanimous verdicts in criminal case. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). For special verdicts on aggravating factors, jurors must be unanimous to find that the State has proven the existence of the aggravating factors beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). Jury unanimity is not required to answer a special verdict "no," however, Bashaw, 169 Wn.2d at 145; Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). Jury unanimity is not required to answer a special verdict "no," however, Bashaw, 169 Wn.2d at 145; Goldger, 149 Wn.2d at 893.

Where the jury is deadlocked or cannot decide, the answer to the special verdict is "no." Id.

The jury here was given eight special verdict forms and instructed that "[b]ecause this is a criminal case, all twelve of you must agree in order to answer the special verdict forms." CP 167-171 (Instruction 64). This is an incorrect statement of law because unanimity is not required for the absence of a special finding. Bashaw, 169 Wn.2d at 145. There was no legitimate reason for counsel's failure to object to the improper instructions.

Moreover, the defense was prejudiced by counsel's deficient performance, even though the jury returned unanimous "yes" verdicts on the enhancements. In Bashaw, the jury received the same erroneous instructions. Rejecting the State's contention that the error was harmless because the jury returned unanimous yes verdict, the Supreme Court held,

The error here was the procedure by which unanimity would be inappropriately achieved.... The result of the flawed deliberative process tell us little about what result the jury would have reached had it been given a correct instruction... We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot concluded beyond a reasonable doubt that the jury instruction error was harmless. Bashaw, 169 Wn.2d at 148.

Here as in Bashaw, because the special verdict instructions

erroneously required unanimity, the special verdicts must be vacated.

VI. CONCLUSION:

For the reason based on the above, Appellant Dara Khann respectfully requests that this Court reverse and dismiss his convictions for first degree rape, and remand for resentencing consistent with the arguments presented herein.

DATED in this 6, day of August 2012.

RESPECTFULLY SUBMITTED

Dara Khann

Dara Khann, #
Petitioner Pro Se
Airway Heights Correction Center
P.O. Box, 2049
Airway Heights, WA 99001

No. 64

You will also be given special verdict forms for the crime(s) charged in Count(s) I, II, and III as to each defendant. As to each count, if you find the defendant not guilty, do not use the accompanying special verdict form. As to count I, if you find the defendant guilty of either Burglary in the First Degree or Burglary in the Second Degree, you will then use the accompanying special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. As to count II, if you find the defendant guilty of either Rape in the First Degree or Rape in the Second Degree, you will then use the accompanying special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. As to count III, if you find the defendant guilty of either Robbery in the First Degree or Robbery in the Second Degree, you will then use the accompanying special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach.

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

COURT OF APPEALS
STATE OF WASHINGTON
2012 ASD-9 AM 11:25

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

STATE OF WASHINGTON)
Plaintiff,) COA No. 67509-5-I
)
VS.) CERTIFICATION SERVICE BY MAIL
)
DARA KHANN)
Defendant,)
_____)

I, Dara Khann hereby certified that I have service the "Statement of Additional Grounds for Review" from Airway Heights Correction Center by U.S Post Office repaid and sending the pleadings to the parties following:

To: The Court of Appeals Division One. One Union Square 600 University Street, Seattle, WA 98101.

To: Mr. Daniel T. Sattergers, King County Prosecuting Attorney, W 554. 516 Third Avenue, Seattle, WA 98104.

To: Mr. Eric J. Nielsen, Attorney for record. 1908 E. Madison Street, Seattle, WA 98122.

I, Dara Khann, Pro Se affidavit pursuant to 28 U.S.C 1746, Dickerson v. Waiwright, 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and had full force, I contended and said every things in this true and belief.

DATED 8/6/12, DARA KHANN, Dara Khann