COA NO. 41167-9-II

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

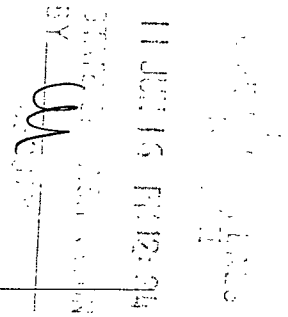
STATE OF WASHINGTON,

Respondent,

v.

DAYLAN BERG,

Appellant.



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

The Honorable Robert Lewis, Judge

SUBSTITUTE OPENING BRIEF OF APPELLANT

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RULES, STAUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's kidnapping conviction.

2. Insufficient evidence supports appellant's intimidating a witness conviction.

3. The court erred in failing to instruct the jury that it need not be unanimous in order to answer "no" on the special verdict forms for the firearm enhancements and aggravating factor.

Issues Pertaining to Assignments of Error

1. Does insufficient evidence support appellant's conviction for kidnapping because the victim was not moved and the restraint was incidental to the robbery?

2. Must appellant's witness intimidation conviction under an accomplice liability theory be reversed because sufficient evidence does not establish appellant knew another was going to commit this crime?

3. Must the special verdicts for each count be vacated because the court did not properly instruct the jury could answer "no" without unanimous agreement?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Daylan Berg and co-defendant Jeffrey Reed with attempted first degree murder, first degree robbery, first degree kidnapping, first degree burglary, and intimidating a witness. CP 1-3.[1] The State sought firearm enhancements for all these counts and further alleged the aggravating circumstance of committing a crime against a police officer in relation to the attempted murder charge. Id. A jury returned guilty verdicts on all counts and affirmative special verdicts on the firearm enhancements and aggravating circumstance. CP 80-92. The court imposed an exceptional sentence of 500 months on the attempted murder count and 748 months total confinement. CP 99, 108. This appeal follows. CP 109.

2. Trial

Albert Watts lived in a house in Vancouver, Washington, which he shared with roommate Ken Walker. RP[2] 986-87, 999. Watts had three

[1] Reed was also charged with unlawful possession of a firearm. CP 1-3.

[2] The verbatim report of proceedings is referenced as follows: RP - 18 consecutively paginated volumes from 7/1/09, 7/8/09, 7/16/09, 7/29/09, 9/18/09, 9/29/09, 10/2/09, 10/9/09, 10/22/09, 11/6/09, 12/15/09, 12/17/09 (two volumes), 12/22/09, 1/27/10, 2/23/10, 3/18/10, 4/16/10, 4/29/10 (two volumes), 5/5/10, 5/13/10, 5/14/10, 5/17/10, 5/18/10, 5/19/10, 5/20/10 (two volumes), 5/24/10 (two volumes), 5/25/10 (two volumes), 5/26/10 (two volumes), 5/27/10, 5/28/10, 6/1/10, 7/19/10, 7/30/10, 8/17/10, 9/3/10,

previous convictions for unauthorized use of a motor vehicle and a conviction for third degree theft. RP 985-86, 1027. He had a medical marijuana grow operation inside the garage and sold marijuana from his house. RP 988-90, 1029.

Watts testified that on the night of April 15, 2009 at about 8:45, two men broke through the back door of the garage as he was watering his marijuana plants. RP 987, 991-94. Watts did not know the men. RP 992. The first person was shorter than six feet tall and stocky. RP 993. The second person was a full head taller with a slender build. RP 993.

When the two men came though the door, the short man ordered Watts to get on the ground while pointing an automatic pistol at his head. RP 992-94. Watts lay down in front of the door. RP 994-95, 1011. The tall man followed the short man into the room. RP 995. The short man, who was "[f]orceful, straightforward, aggressive, " gave the gun to the tall man and told him to hold Watts down. RP 992, 995. The tall man did as he was told by putting a knee in Watts' back and the gun to Watts' head. RP 995.

They yelled they were there to take the plants and whatever they wanted. RP 995. The short man asked where Watts' roommate was. RP 997. Watts said he was at work. RP 997. The short man made a couple

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9/15/10.

trips in and out of the garage. RP 997-98. He ripped up the plants and stuffed them into something. RP 999.

The tall man told Watts to keep looking straight down and reminded Watts they would kill him whenever he tried to turn his head. RP 998. Watts estimated he was pinned to the floor for 30 minutes. RP 999. The tall man eventually became agitated, as if he were nervous or scared the short man was not coming back. RP 999-1000.

When the short man returned, the tall man got off Watts and asked what they were going to do. RP 1000. The short man told Watts he had his wallet, knew where he lived, could find him, and asked if he was going to call the police. RP 1000. Watts said no. RP 1000. The short man asked "What are you gonna tell the police?" RP 1000. Watts said "I'll tell them nothing." RP 1000. The short man said "We will find you." RP 1000. The prosecutor later asked "What was it, if anything, that they said they would do if you went to the police?" RP 1017. Watts answered "They would hunt me down and kill me." RP 1017. The men left without physically harming Watts. RP 1000, 1034. After a few minutes, Watts went to the kitchen and discovered his phone and wallet were missing. RP 1000-01. Watts was unable to identify the perpetrators from a later photo array or at trial. RP 1005, 1027, 1034-35.

That night, neighbor Cynthia Surber saw a short person wearing a black hoody creeping to and from the Watts' residence carrying something that looked like a Christmas tree in a pillowcase. RP 1085-86, 1092-98, 1103. She saw a white car back into the driveway and people loading something into the car. RP 1093-94, 1098-99. A second, taller person stood behind the car. RP 1103-04. Surber saw three or four people. RP 1099-1101. The car drove then away. RP 1096.

Summer Sterrett lived in Ken Walker's house in 2007. RP 1556-57. Jeffrey Reed was the father of her son. RP 1557-58. She knew Reed to drive a white Kia Spectra, which belonged to his wife Wendy Vasquez. RP 558. Sterrett also knew Daylan Berg. RP 1559. Reed and Berg visited her at the Walker residence in 2007. RP 1559-60.

Sterrett later visited the Walker residence in March 2009, by which time Watts had moved in and was growing marijuana. RP 1562. Reed came over and was in the garage at one point. RP 1563-64, 1566-68.

Keely Royston was the girlfriend of Reed's brother, James Roberts. RP 1681. As part of a cooperation agreement, Royston testified for the State with the expectation that a pending charge of rendering criminal assistance would be dropped. RP 1695, 1705. Royston testified Reed lived at his wife's residence as of April 2009. RP 1682. His wife owned a white Kia Spectra, which Royston had seen Reed drive. RP 1683.

According to Royston, Reed and Berg came to the house Royston shared with Roberts at around suppertime on April 15, 2009. RP 1682-84. They watched a basketball game and ate. RP 1684. Reed and Berg left about an hour later. RP 1684. Prior to leaving, Royston gave Berg a black Carhartt jacket to wear. RP 1684-85.

Vancouver Police Sergeant Jay Ali, responding to the neighbor's 911 call regarding the Watts' incident, saw and followed a white Kia Spectra car in his unmarked patrol car. RP 1132-36, 1154. Alie activated the emergency lights on his vehicle located in the grill bumper and visor. RP 1137-38, 1154-55. The Kia soon stopped. RP 1136-38. Alie saw two people inside. RP 1139. Officer Donohue arrived as backup without activating emergency lights on his vehicle. RP 1138.

After about two minutes, Alie, who was in dark uniform, walked to the driver's side door to make contact while Donohue moved toward the passenger side. RP 1113, 1119-20, 1138, 1140-41. Alie noticed a marijuana plant inside the car. RP 1141. Alie told the driver, who was wearing a dark hooded sweatshirt, to turn off the vehicle. RP 1142, 1195. The driver paused, said "okay," and then bent over towards the center console. RP 1143-44. As Alie leaned through the window to grab the driver, the passenger raised a gray semiautomatic handgun and fired. RP

1144-45.[3] A bullet struck Alie in the chest, lodging in his ballistic vest. RP 1149-50. Alie jumped back and the white car sped away. RP 1113, 1146.

Alie did not see the shooter well enough to recognize him. RP 1147. He described the driver as a white male with a scruffy beard and reddish or light colored hair. RP 1151, 1203. He described the passenger as clean-shaven with short brown hair, possibly wearing a brown jacket. RP 1151, 1199, 1203, 1301-03.

Responding to a dispatch report of the shooting, Portland police officer Timothy Pahlke drove to the Portland address of Reed's wife, who was the registered owner of the Kia. RP 1204-06, 1211. Pahlke saw a Kia driving by the residence. RP 1211. He followed and quickly located the car abandoned nearby with the engine running. RP 1211-12. He saw a large plasma TV and marijuana plants inside. RP 1214. A security perimeter was established in relation to the Kia. RP 1213-14.

Nearby resident Shawn Wood called 911 and reported seeing a person five feet five to nine with blonde hair wearing a black hoody run and climb over a fence to the adjacent property. RP 1225-27, 1232-34. Wood saw a red I-Roc enter the apartment complex area and idle. RP

[3] Alie told a detective right after the event that he was shot through the back window. RP 1196-98.

1227-29. The person she had seen earlier climbed back over the fence and entered the car, which then left the parking lot. RP 1228-29. Police found a black Carhartt jacket laying in the backyard of a residence in the area. RP 1544-47, 1550-52.

Royston said Roberts received a telephone call at their residence at around 10 o'clock that night. RP 1687. Berg then knocked on the door and Roberts let him in. RP 1687-88. Phone records showed calls from a number that Sterrett associated with Reed to Robert's work cell phone. RP 1559, 1690-91, 1791-92; 1809, 1818, 1824-25. Roberts told Royston he would be right back and left in a maroon I-Roc Camaro. RP 1689.

Meanwhile, police set up a security checkpoint and stopped cars leaving the area. RP 1236-38, 1249. A maroon I-Roc Camaro drove past the line of cars waiting at the security checkpoint. RP 1238-39. The Camaro stopped after being flagged down by an officer. RP 1238.

Reed was the passenger. RP 1240-41. James Roberts, Reed's brother, was the driver. RP 1241, 1272. Both had shaky hands and were sweating, even though it was cold out. RP 1239-40. A cell phone belonging to Watts was found in Reed's front pocket. RP 1016, 1258-59, 1275-76, 1314-15, 1319-20. Reed was detained without incident. RP 1241, 1251, 1258, 1262-63. Roberts was handcuffed. RP 1272.

A pet store receipt belonging to Watts was later recovered from the Camaro. RP 1015, 1655-67. Marijuana matter was stuck to the sole of Reed's shoe. RP 1822-23, 1846. Watts' wallet was later recovered from the Oregon house of a person named Janice Sabin. RP 2077-78.

Royston, Roberts' girlfriend, said she gave Berg a ride to a Vancouver apartment complex sometime on the morning of April 16 after Berg stayed the night at her house. RP 1692-94. Another witness testified Berg went to the apartment of Dustin Hall around 7:30 a.m. on April 16. RP 1714. Berg asked Hall's girlfriend if he could stay. RP 1715. She declined but gave Berg a ride to the house of Hall's parents on North Oswego Street in Portland. RP 1715-17.

Police set up surveillance on the Oswego address that same morning. RP 1723-24. Police saw Berg and, fearing he noticed their surveillance, contacted him as he was walking in backyard of the residence. RP 1726-29. An officer saw a pistol sticking out of the waistband of Berg's pants. RP 1737-38. Police ordered Berg to drop the gun. RP 1738. A .40 caliber Smith and Wesson semiautomatic pistol fell out as Berg went to the ground. RP 1738, 1750.

Police later searched the Kia and recovered a .40 caliber round and a shell casing near the seat. RP 1648-51. Police also found a piece of black plastic under the driver's seat. RP 1649, 1652-53.

Alie's shirt was missing a button. RP 1297-98, 1356. On April 16, four black button pieces were found at the unsecured scene of the shooting. RP 1356, 1389-90. The State's forensic microanalyst opined the individual button fragment found in the Kia and the four button fragments recovered from the crime scene were part of the same button and could have come from Alie's uniform shirt. RP 1873-74.

A State firearm and tool mark examiner opined the cartridge recovered from the Kia and the bullet recovered from Alie's vest came from the firearm dropped by Berg in the backyard of the Oswego address. RP 1648-51, 1944, 1973-77, 1991-92. A defense forensic scientist opined it was inconclusive whether the cartridge and bullet came from that firearm. RP 2026, 2031, 2035-36, 2053.

Berg was excluded as a possible contributor to DNA found on the black Carhartt jacket. RP 2056, 2062-63, 2075. DNA samples recovered from the Kia did not match Berg. RP 2063-65.

Michael Aldritt testified for the State, claiming Berg spoke with him in jail 15 to 30 times over course of three months, boasting about his involvement in a home invasion burglary and an officer shooting in Vancouver. RP 1901-02, 1907, 1919-1920. Berg allegedly told Aldritt he planned a home invasion with a friend and followed through that same day. RP 1902. They were pulled over after leaving the home invasion. RP

1903. When the officer came to the driver's door, Berg, sitting in the passenger seat, reached over the driver and shot the officer. RP 1903. Berg was arrested while walking down the street in Portland the next day. RP 1903, 1918. He threw a gun upon arrest, which was involved with the Vancouver crimes. RP 1903. According to Aldritt, Berg also said he obtained the pistol from the marijuana robbery. RP 1916-17.

Aldritt had read a newspaper article about the incident. RP 1915. Aldritt also had four convictions for first degree theft, one second degree theft conviction, a forgery conviction, and a felony conviction for taking of motor vehicle. RP 1899-1900, 1904-06. He had pending charges for commercial distribution, felon in possession of a firearm, and unauthorized use of a motor vehicle. RP 1889-99. He testified against Berg as part of a cooperation agreement with prosecutors. RP 1899. In exchange for testifying, he would receive a suspended sentence instead of serving up to four years in prison. RP 1905-07, 1911. That is why he testified. RP 1906-07, 1911. Aldritt conceded some people could conclude he was a thief and a liar. RP 1906.

Berg's defense was that he was not there when criminal activity took place and that the circumstantial evidence did not add up to proof beyond a reasonable doubt that he committed the charged crimes. RP 2319, 2322, 2369.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO PROVE THE KIDNAPPING AS A SEPARATE CRIME UNDER THE INCIDENTAL RESTRAINT DOCTRINE.

Evidence was insufficient to convict Berg of kidnapping because the restraint was incidental to the robbery. The kidnapping conviction must therefore be vacated and dismissed with prejudice.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

To establish a defendant committed the offense of first degree kidnapping, the State must prove that the defendant intentionally abducted another person. RCW 9A.40.020. Abduction is a "critical element in the proof of kidnapping." State v. Green, 94 Wn.2d 216, 225, 616 P.2d 628 (1980). "Abduct" means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means

"to restrict a person's movements without consent" and "'restraint' is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(1).

But "the mere incidental restraint and movement of [a] victim during the course of another crime" is insufficient to show a separate kidnapping crime where the movement and restraint had "no independent purpose or injury." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (kidnapping not incidental to murder where defendant planned to kidnap random victim and was in the course of kidnapping victim when the plan went awry, resulting in murder); see Green, 94 Wn.2d at 227 (where defendant grabbed victim, carried her 50-60 feet, placed her behind building and killed her there, insufficient evidence of kidnapping because the restraint and movement of the victim was merely "incidental" to homicide rather than independent of it).

In other words, to sustain a conviction for kidnapping, the restraint must be incidental to the commission of the kidnapping that has an independent purpose and effect, not merely incidental to commission of another crime. State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760 (2010). Whether the kidnapping is incidental to the commission of another crime is a fact-specific determination. Elmore, 154 Wn. App. at 901; State v. Korum, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), rev'd on

other grounds, 157 Wn.2d 614, 141 P.3d 13 (2007). To affirm the kidnapping conviction, sufficient evidence must show Berg or Reed restrained and moved Watts for a purpose independent from the intent to commit robbery. No such evidence appears in this record.

In Korum, this Court held as a matter of law that the kidnapping convictions were incidental to the robberies and therefore not supported by sufficient evidence because (1) the restraint used was for the sole purpose of facilitating the robberies; (2) forcible restraint is inherent in armed robberies; (3) the restrained victims were not moved away from their homes; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint was not substantially longer than the commission of the robberies; and (5) the restraint did not create danger independent of the danger posed by the armed robberies themselves. Korum, 120 Wn. App. at 707.

Those same features are present in Berg's case. The restraint used on Watts (knee in back and gun to head) was for the sole purpose of facilitating the robbery inside his house. RP 991-95, 999. Watts was restrained so that the men could complete the robbery. The duration of the restraint was not substantially longer than the commission of the robbery. Indeed, the restraint was contemporaneous with the commission of the robbery. RP 991-1000.

As in Korum, Watts was not moved away from his home, which meant that he was not secreted in a place where he was unlikely to be found. Korum, 120 Wn. App. at 707. In fact, Watts was not moved anywhere at all. The perpetrators broke down the back door to the garage and restrained Watts in front of that door for the duration of the encounter. RP 991-95, 1011. Watts was not secreted anywhere, much less to a place where he was unlikely to be found.

Finally, Watts' restraint, consisting of being placed on the floor with a knee in his back and a gun to his head, did not endanger him above and beyond the danger posed by the armed robbery itself, which consisted of taking Watts' property against his will by the threatened use of violence or fear of injury while armed with a firearm. Watts was not physically injured in any way. RP 1000, 1034.

When the only evidence presented to the jury demonstrates that the restraint is merely incidental to completing another crime, the jury has not received sufficient evidence to convict the defendant of a separately charged kidnapping. Korum**Error! Bookmark not defined.**, 120 Wn. App. at 707. For this reason, Berg's kidnapping conviction must be reversed and the charge dismissed with prejudice due to insufficient evidence. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial after conviction is

reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

Berg is also entitled to a new sentencing hearing. Reversal of the kidnapping conviction reduces Berg's offender score and standard range on the attempted murder conviction. A sentencing court must correctly determine a defendant's standard sentencing range before imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 188, 937 P.2d 575 (1997). "Remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." Parker, 132 Wn.2d at 192-93.

The court here imposed an exceptional sentence of 500 months confinement for the attempted murder count in addition to the 60 month firearm enhancement. CP 97-99. The court's sentencing comments and its findings in support of the exceptional sentence do not clearly show the same length of sentence would have been imposed if the standard range for the attempted murder count were lower. RP 2505-07; CP 108. The case should be remanded for resentencing.

2. THE EVIDENCE IS INSUFFICIENT TO CONVICT BERG AS AN ACCOMPLICE TO WITNESS INTIMIDATION.

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133

Wn. App. 789, 796, 137 P.3d 892 (2006). The record lacks sufficient evidence establishing Berg knew Reed was going to commit the crime of witness intimidation. Due process requires reversal of Berg's conviction for witness intimidation. U.S. Const. amend, XIV; Winship, 397 U.S. at 364; Smith, 155 Wn.2d at 502.

The State charged Berg and Reed with intimidating a witness as a "principal or accomplice" by attempting to induce Watts by means of a threat not to report information relevant to a criminal investigation. CP 3. RCW 9A.72.110(1)(d) provides a person commits the crime of intimidating a witness "if a person, by use of a threat against a current or prospective witness, attempts to . . . Induce that person not to report the information relevant to a criminal investigation[.]"

Watts testified the shorter person — Reed — was the person who actually threatened him not to go to the police. RP 1000. There was no dispute at the trial level that Reed was the one who uttered the threat. RP 2252, 2278, 2292, 2382. The State needed to show Berg was guilty as an accomplice, consistent with the court's instructions and its theory of the case. CP 72 (Instruction 42); RP 2421.

A person is guilty of a crime as an accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to

commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a).

"The State must show that the defendant aided in the planning or commission of the crime and had knowledge of the crime." State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 69 (2005). The evidence does not establish Berg knew Reed was going to threaten Watts in an attempt to induce him not to go to the police. At most, the evidence showed Reed's act of witness intimidation was a foreseeable act. But that is not enough to convict someone as an accomplice. State v. King, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002) (foreseeability insufficient).

Accomplice liability attaches only when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. State v. Roberts, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000). The Supreme Court has rejected the "in for a dime, in for a dollar" theory of complicity wherein accomplice liability strictly attaches for any and all crimes that follow. Roberts, 142 Wn.2d at 512-13; In re Pers. Restraint of Domingo, 155 Wn.2d 356, 365-66, 119 P.3d 816 (2005). The culpability of an accomplice does not extend beyond the charged crime of which the accomplice actually has knowledge. Roberts, 142 Wn.2d at 510-11.

Viewing the evidence in the light most favorable to the State, the evidence does not show Berg, in participating in the robbery and burglary, knew Reed was going to commit the crime of witness intimidation. Based on the evidence, the State acknowledged in closing that Reed was the person in charge of the home invasion: "he was pretty much bossing both Berg and Mr. Watts around during that home invasion." RP 2251, 2278. When Reed returned to the garage area, Berg asked what they were going to do with Watts. RP 1000. At that point Reed threatened Watts not to go the police, thereby committing the crime of witness intimidation. RP 1000.

To withstand constitutional scrutiny, the verdict against Berg must be supported by substantial evidence. State v. Prestegard, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001). "In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture." Prestegard, 108 Wn. App. at 23. "While an accomplice may be convicted of a higher degree of the general crime he sought to facilitate, he may not be convicted of a separate crime absent specific knowledge of that general crime." King, 113 Wn. App. at 288. Evidence of Berg's specific knowledge that Reed would commit the crime of witness intimidation is lacking on this record.

It is not enough that Berg's conduct ultimately helped lead to Reed's act of witness intimidation, even if he should have anticipated that such

conduct could lead to witness intimidation. "[F]oreseeability is not sufficient to establish accomplice liability." King, 113 Wn. App. at 288.

The question comes down to whether Berg had knowledge that he was aiding in the specific crime of witness intimidation. Id. Necessary facts supporting verdicts cannot rest upon guess, speculation, or conjecture. Colquitt, 133 Wn. App. at 796. The evidence against Berg is too insubstantial to show he knowingly aided the crime of witness intimidation. Berg may have conducted himself in a manner that ultimately led to a foreseeable act of witness intimidation, but the evidence is insufficient to convict him as an accomplice to that act. Berg's witness intimidation conviction must therefore be reversed and the charge dismissed with prejudice. DeVries, 149 Wn.2d at 853; Anderson, 96 Wn.2d at 742. Berg is also entitled to a new sentencing hearing. Parker, 132 Wn.2d at 188, 192-93.

3. THE FLAWED SPECIAL VERDICT INSTRUCTIONS ON UNANIMITY REQUIRES VACATURE OF THE EXCEPTIONAL SENTENCE AGGRAVATOR AND FIREARM ENHANCEMENTS.

Jurors were incorrectly instructed they needed to be unanimous to answer "no" to the special verdicts on whether the attempted murder was committed against a law enforcement officer and whether Berg was armed

with a firearm during the commission of the charged offenses. The special verdicts must therefore be vacated.

a. Jury Instructions Failed To Set Forth The Correct Legal Standard On Unanimity For Special Verdicts.

The jury was given special verdict forms for counts I through V. CP. Two special verdict forms addressed count I. "Special Verdict 1, Count I" stated:

> We, the jury, having found the defendant guilty of attempted murder in the first degree, return a special verdict by answering as follows:
>
> Was the crime committed against a law enforcement officer who was performing his or her official duties at the time of the crime, and did the defendant know the victim was a law enforcement officer?
>
> ANSWER: _____
> (Write in "yes" or "no")

CP 82.

The remaining special verdicts forms, encompassing counts I through V, required the jury to answer "yes" or "no" to the question of whether Berg was armed with a firearm at the time of the commission of the offense. CP 83, 85, 88, 90, 92.

Instruction 46 told the jury what was required in order to answer these special verdict forms:

> You will also be given special verdict forms for the crimes charged in counts I-5 for each defendant. If you

> find a defendant not guilty as charged, do not use the special verdict form for that crime. If you find a defendant guilty of a crime charged, you will then use the special verdict forms for that crime and defendant and fill in the blank with the answer "yes or "no" according to each decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer a special verdict form.* In order to answer a special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 77 (emphasis added).

Instruction 46, which stated all 12 jurors must agree on an answer to the special verdict, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.").

Instruction 46 presented the jury with a false choice between unanimously agreeing that the answer was "yes" or unanimously agreeing the answer was "no." The third option — answering "no" where at least one juror did not agree — was not presented to the jury.

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. Id. at 146 (citing State v. Goldberg, 149

Wn.2d 888, 72 P.3d 1083 (2003)). This rule applies to special verdicts on sentence enhancements and aggravating circumstances. Bashaw, 169 Wn.2d at 147; State v. Ryan, __Wn. App.__, __ P.3d __, 2011 WL 1239796 at *2-3, No. 64726–1–I (slip op. filed April 4, 2011).

b. The Instructional Error Was Not Harmless Beyond A Reasonable Doubt Because It Distorted The Deliberative Process.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In order to hold this jury instruction error was harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. As in Bashaw, "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Id.

Given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. As articulated by the Court in Bashaw, "We can only

speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless." Id. at 147-48. The same holds true here. The sentencing enhancements should be vacated. Id. at 148.

c. The Instructional Error May Be Raised For The First Time On Appeal.

The State proposed the flawed instruction. CP 615. Defense counsel did not object to the instruction but the error can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). Ryan, 2011 WL 1239796 at *2. The defendant in Bashaw did not object to the flawed special verdict instruction[4] but the Supreme Court still reversed after applying the harmless error test applicable to constitutional error. Bashaw, 169 Wn.2d at 147-48.

Division Three recently declined to review a Bashaw error raised for the first time on appeal. State v. Nunez, 160 Wn. App. 150, 153-54, 248 P.3d 103 (2011). The Nunez court believed the error was not

[4] State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

constitutional. Nunez, 160 Wn. App. at 159. But the Supreme Court in Bashaw did. Bashaw, 169 Wn.2d at 147-48. A decision by the Supreme Court is binding on all lower courts in the state. 1000 Virginia P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). This Court should follow Division One's holding in Ryan that a Bashaw error can be raised for the first time on appeal. Ryan, 2011 WL 1239796 at *2 .

Both the Washington Constitution and United States Constitution guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. 1 , §§ 3, 22. Only a fair trial is a constitutional trial. Charlton, 90 Wn.2d at 665. The failure to provide a fair trial violates minimal standards of due process. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994); U.S. Const. amend. XIV; Wash. Const. art. 1 , § 3.

"[M]anifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). It is "well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal." State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). To 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. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009).

The applicable law here is that the jury need not be unanimous to return a special verdict of "no."

The right to a jury trial embodies the right to have each juror reach his or her verdict by means of "the court's proper instructions." State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978) (reversal required where judge's questioning suggested need for holdout jurors to come to an agreement on special verdict). Goldberg, which held the trial court erred by instructing a nonunanimous jury to reach unanimity on the special verdict, cited Boogaard and the right to a jury trial as authority for its decision. Goldberg, 149 Wn.2d at 892-93.

The incorrect instruction on unanimity results in a flawed deliberative process. Bashaw, 169 Wn.2d at 147. Division Three in Nunez does not explain how jury instruction that causes a flawed deliberative process somehow avoids a due process violation. Division One in Ryan properly recognized the due process violation. Ryan, 2011 WL 1239796 at *2. The integrity of the fact finding process is a basic component of due process. Parker v. United Airlines, Inc., 32 Wn. App. 722, 728, 649 P.2d 181 (1982). "To require the jury to be unanimous about the negative — to be unanimous that the State has not met its burden — is to leave the jury without a way to express a reasonable doubt on the part of some jurors." Ryan, 2011 WL 1239796 at *2. The instructional

error here is constitutional in nature because it violates the constitutional right to a fair jury trial and due process. The error is properly raised on appeal under RAP 2.5(a)(3).

Moreover, RAP 2.5(a) "never operates as an absolute bar to review." Ford, 137 Wn.2d at 477. This Court may review an issue raised for the first time on appeal in the interest of justice. RAP 1.2(a); State v. Lee, 96 Wn. App. 336, 338 n.4, 979 P.2d 458 (1999).

D. CONCLUSION

For the reasons stated, Berg requests that this Court reverse the convictions, vacate the special verdicts and remand for resentencing.

DATED this 14th day of June 2011.

Respectfully Submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 41167-9-II
	)	
DAYLAN BERG,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF JUNE 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUBSTITUTE OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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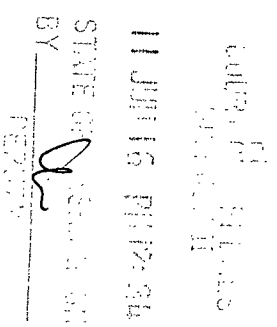

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF JUNE 2011.

x Patrick Mayovsky