

65002-5

65002-5

NO. 65002-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JUSTIN BACANI,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

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

2. An erroneous jury instruction is harmless if the court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Here, the jury unanimously found that Bacani was guilty of assaulting Bankhead with a deadly weapon. Can this Court conclude that the jury verdict on the deadly weapon enhancement would have been the same absent any error in the instructions?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Justin Bacani was charged by information with assault in the second degree and unlawful imprisonment. CP 1-2. On the assault in the second degree count, the State also alleged a deadly weapon enhancement. Id.

Trial occurred in December 2009 and January 2010. The jury found Bacani guilty of assault in the second degree, but acquitted him of unlawful imprisonment. CP 45-46. The jury also found that Bacani was armed with a deadly weapon at the time of the assault. CP 47. The court imposed a standard range sentence. CP 53-61.

## 2. SUBSTANTIVE FACTS.

H. Breae-Raeann Bankhead met Bacani in February 2009. 9RP 14.<sup>1</sup> They immediately began dating, but their relationship only lasted for about a month. 9RP 19. After a few months of separation, Bankhead called Bacani and started seeing him again. 9RP 22-24.

On Monday, June 1, 2009, Bankhead had a friend drop her off at Bacani's home. 9RP 26-27. Although she only planned for a short visit, Bankhead spent several nights at Bacani's house. 9RP 28-32. Bacani shared a split-level house with other family

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<sup>1</sup> The verbatim report of proceedings consists of 13 volumes, which are referred to in this brief as follows: 1RP (October 14, 2009); 2RP (November 6, 2009); 3RP (November 30, 2009); 4RP (December 22, 2009--pretrial motions); 5RP (December 22, 2009--voir dire); 6RP (December 23, 2009--motions, discussions regarding jury selection); 7RP (December 23, 2009--voir dire); 8RP (December 29, 2009--voir dire and opening statements); 9RP (December 29, 2009--trial testimony); 10RP (December 30, 2009); 11RP (January 4, 2010); 12RP (February 5, 2010); and 13RP (February 26, 2010).

members; his bedroom was downstairs, while his mother and step-father lived upstairs. 9RP 25. During this visit, Bankhead and Bacani spent most of their time in Bacani's portion of the house. 9RP 31.

On the evening of June 4, Bacani and Bankhead argued. 9RP 32. Bankhead told Bacani that she planned to leave the next day, but Bacani did not want her to leave. 9RP 32-33. They never resolved the argument, and eventually they both went to sleep. 9RP 33-34. When Bankhead awoke the next morning, her shoes and her clothes were missing. 9RP 35. Bacani admitted that he had hidden her clothes because he did not want her to leave. 9RP 35-36. Bankhead remained in Bacani's bedroom, naked and pleading with him to return her clothes. 9RP 36-37.

After several hours, Bankhead tried to use Bacani's phone to call her brother. 9RP 38-39. This further upset Bacani and he started to become violent. Id. The two struggled until Bankhead wound up on the bed, with Bacani straddling her. 9RP 45. Bankhead screamed and, in response, Bacani bit or twisted her nipple. 9RP 46-48. Bacani then held a 12 inch, serrated knife to her neck, saying, "I could kill you right now and I could cut you up and I have plastic on my bed and the police could never find you...."

9RP 41. Bacani removed the knife from Bankhead's neck and sliced her hand. 9RP 49.

Bacani allowed her to get up and bandage her hand.

9RP 53. Once Bacani fell asleep, Bankhead put on her jacket and Bacani's pajama pants and slippers, and snuck upstairs to call her mother for a ride. 9RP 54-55. She did not tell Bacani's mother what had occurred downstairs. Id.

Bankhead ran down the hill to wait for her mother near the bus stop. 9RP 57-58. She spotted Bacani looking for her and hid behind some bushes until her mother arrived. Id.

**C. ARGUMENT**

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

Relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Bacani argues that the deadly weapon enhancement should be reversed and dismissed because the special verdict instruction told the jury that it must be unanimous in order to answer "no." Bacani failed to object to the instruction at the time it was offered. Because any error in the jury instruction is not a

manifest error affecting a constitutional right, Bacani waived this argument by failing to preserve the objection.

a. Relevant Facts.

The court provided the jury with a special verdict form for the deadly weapon enhancement. CP 47. In regards to the special verdict forms, the court instructed the jury:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "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 44. This instruction is identical to WPIC 160.00. Despite the State's motion to compel the defense to submit jury instructions, Bacani did not propose any instructions. 4RP 18; 11RP 48. However, Bacani did not take exception to the instruction at issue. 11RP 6.

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

Under CrR 6.15(c), objections to proposed jury instructions must be made before the court instructs the jury, so as to allow the

trial court the opportunity to correct any error. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492, 494 (1988). Before error can be claimed on the basis of a jury instruction given by the trial court, the appellant must show that a timely objection was made in the trial court. State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246, 1250 (1995).

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

Not all instructional error rises to the level of manifest constitutional error. Examples of manifest constitutional errors in

jury instructions include: shifting the burden of proof to the defendant, State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); failing to define the “beyond a reasonable doubt” standard, State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); and omitting an element of the crime charged, State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds, State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). On the other hand, failure to instruct on a lesser included offense, State v. Mak, 105 Wn.2d 692, 745-49, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); and failure to define individual terms, State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492, 495 (1988), are examples of instructional error that do not fall within the scope of manifest constitutional error.

Bacani relies heavily on Bashaw and its interpretation of State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). Bashaw was charged with three counts of delivering a controlled substance. Bashaw, 169 Wn.2d at 137. The State further alleged that the deliveries occurred within 1000 feet of a school bus stop. Id. The court instructed the jury that “since this was a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. The Supreme Court held that the instruction was incorrect

because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing Goldberg, supra, the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146.

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

countervailing policies of judicial economy and finality." Id. at 146-47.

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

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

Moreover, even if this issue could be raised for the first time on appeal, the error was harmless. A jury instruction is harmless if the court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147. In Bashaw, the court held that it could not find the error harmless because of a "flawed deliberative process." Id. However, in Bashaw the distance from the school bus stop was a disputed issue, with the defense objecting to the State's measurements. Id. at 138.

In the present case, Bacani was convicted under the deadly weapon prong of assault in the second degree. CP 34. Before considering the special verdict, the jury unanimously found that

Bacani was guilty of assaulting Bankhead *with a deadly weapon*. Accordingly, while the Bashaw court speculated that the error in the instruction might have some impact on the jurors' verdict, here, the jurors resolved the deadly weapon issue before deliberating on the special verdict. Unlike in Bashaw, this Court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent any error in the instructions.

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

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

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

719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The right to a unanimous verdict in a criminal case is not reserved for the benefit of the defendant. Just as the State could not waive the unanimity requirement for a guilty verdict, a defendant cannot waive the unanimity requirement for acquittal. State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966). In Noyes, the defendant's first trial resulted in a hung jury in which the jury had voted 11 to 1 for acquittal. The defendant was convicted in a second trial and on appeal argued that he could waive a unanimous verdict and accept the vote of 11 jurors as an acquittal. The court rejected this notion, characterizing it as "without merit." Id. at 446.

When the legislature enacts a statute, it is presumed to be familiar with judicial interpretations of statutes. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610, 619 (2000). This presumption applies to the court's rulings on jury unanimity. Only RCW 10.95.080(2), which governs sentencing of aggravated first degree murder, assigns meaning to a non-unanimous verdict. All other sentencing statutes remain silent on the issue. Thus, for all other sentencing statutes, consistent with the dictates of Const. art. I,

§ 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

D. CONCLUSION

For the reasons cited above, this Court should affirm Bacani's enhanced sentence.

DATED this 9 day of February, 2011.

Respectfully submitted,

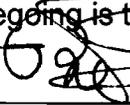
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JUSTIN BACANI, Cause No. 65002-5-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
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