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FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

2010 OCT 25 AM 10:30

NO. 65204-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

MARK A. KOGER,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) The trial court instructed the jury that any answer to the special verdict would need to be unanimous. This specific language was requested by the defendant. Can he challenge this language on appeal?

(2) If the issue can be raised, was the error harmless, where the verdict on the underlying offense reflects a unanimous finding that the defendant was armed with a deadly weapon, and the only weapon involved was a firearm?

(3) If the special verdict is reversed for instructional error, is the proper remedy a new trial?

II. STATEMENT OF THE CASE

The defendant (appellant), Mark A. Koger, was charged with first degree assault with a firearm enhancement, committed on October 30, 2009. 1 CP 76. According to the State's evidence at trial, Lani LaMunyon heard gunshots and a dog yelping near her house in Sultan. The sounds were coming from the area of an abandoned airfield. She went to see if the dog was okay. She saw a man with a gun standing near a dog. At first, the dog's tail

was wagging, but then it stopped. Ms. LaMunyon asked her roommate's son to call police. 1 RP 48-51.¹

Snohomish County Deputy Sheriff Daryl Hansmann responded to the call. After obtaining information from bystanders, he approached the airfield. He came around a hangar and saw the defendant with a rifle in his hand. The defendant was facing away from him. 2 RP 15-24.

Dep. Hansmann identified himself and ordered the defendant to drop his gun. The defendant turned and shouted "no." As he was saying this, he brought the rifle up and fired. Dep. Hansmann was looking right down the barrel of the gun. He ducked behind the hangar wall. From the sound that the bullet made, he knew that it had passed close to him. 2 RP 24-29.

When Dep. Hansmann peeked out, he saw the defendant moving out of sight. He then heard a shot. He heard the defendant groan and saw him fall. Dep. Hansmann came out and found that the defendant had shot himself in the chest. 2 RP 30-32.

¹ The volumes of the Report of Proceedings will be referred to as follows:

1 RP – March 1, 2010

2 RP – March 2, 2010

3 RP – March 3, 4, and 16, 2010

The defendant testified that he had intended to kill himself. He began by shooting his dog. 3 RP 42-46. After he had done this, a police officer arrived and told him to drop the gun. The defendant instead pointed his gun into the sky and fired. He intended to induce the officer to shoot him. When the officer got out of the way, the defendant shot himself. 3 RP 42-50, 66-67.

With regard to the special verdict, the jury instructions included the following language:

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."

1 CP 37, inst. no. 16 (Appendix A). This identical language had been requested by the defense. 1 CP 63, def. inst. no. 19 (Appendix B).

The jury was unable to reach a verdict on the charge of first degree assault. 1 CP 16. It found the defendant guilty of the lesser offense of second degree assault. 1 CP 15. The jury answered the special verdict form "yes." 1 CP 14.

The court imposed a standard range sentence of 45 months' confinement. This reflected 9 months for the second degree

assault (the top of the standard range) and 36 months for the firearm enhancement. 1 CP 6.

III. ARGUMENT

A. THE DEFENDANT CANNOT CHALLENGE INSTRUCTIONAL LANGUAGE THAT HE PROPOSED.

The defendant's sole assignment of error is a challenge to the instruction on the procedure for reaching a special verdict. 1 CP 37, inst. no. 16. He claims that the instruction should not have required the jury to be unanimous in order to answer the question "no." This argument is supported by the Supreme Court's subsequent decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). The defendant cannot, however, raise this issue, because the error was invited.

The exact language used in the trial court's instructions was proposed by the defense. 1 CP 63, def. inst. no. 19. "A party cannot request an instruction and later complain on appeal that the instruction should not have been given." State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). It makes no difference that the instruction was a pattern instruction. State v. Studd, 137 Wn.2d 533, 547-48, 973 P.2d 1049 (1999). Since the defendant requested the language that he now challenges, the issue cannot be reviewed.

B. SINCE THE VERDICT ON THE UNDERLYING OFFENSE NECESSARILY REFLECTED A UNANIMOUS FINDING THAT THE DEFENDANT WAS ARMED WITH A FIREARM, ANY ERROR IN THE SPECIAL VERDICT INSTRUCTION WAS HARMLESS.

If the issue can be raised at all, the next question is whether any error in the instruction was harmless. Bashaw holds that such an error can be harmless if the court can “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.”² Bashaw, 169 Wn.2d at 147. Bashaw goes on to hold that the existence of a unanimous verdict is not sufficient to render the instruction harmless. This is because the instruction could affect the procedure by which unanimity was reached. Id. at 202-03.

In the present case, however, this concern is absent. This is

² It is hard to understand why the court applied the “beyond a reasonable doubt” harmless error standard. This standard is ordinarily applied only to constitutional error. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Bashaw expressly states that its holding is not compelled by constitutional protections, but rather by common law precedent. Bashaw, 169 Wn.2d at 146 n. 7. Non-constitutional error is ordinarily considered harmless if, within reasonable probabilities, the error did not materially affect the outcome of the trial. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); see Bashaw, 169 Wn.2d at 143 (applying “reasonable probabilities” standard to evidentiary error affecting special verdict). Nonetheless, this court is bound to follow the analysis adopted by the Supreme Court.

because the substantive offense included an element that the defendant committed the assault with a deadly weapon. The jurors were told that they could convict only if the State proved all of the elements beyond a reasonable doubt. 1 CP 32, inst. no. 12. They were also told that they could convict only if they unanimously agreed on a verdict. 1 CP 37, inst. no. 16. Thus, the guilty verdict on second degree assault necessarily reflects a unanimous determination that the defendant committed the assault with a deadly weapon. The only weapon involved in this case was a firearm.

With regard to the special verdict, the jurors were told that they were to answer the question only if they found the defendant guilty. 1 CP 37, inst. no. 16. Thus, *before* the jurors considered the special verdict, they had already unanimously determined that the defendant was armed with a deadly weapon, which under the evidence must have been a firearm. Harmless error analysis assumes that the jury rationally considered the evidence. See State v. Bobenhouse, 166 Wn.2d 881, 894-95, 214 P.3d 907 (2009). Under the evidence in this case, there is no way that any rational person could find that the defendant was guilty of second degree assault and then answer the special verdict “no.” Since the

jurors had in effect already unanimously agreed on the special verdict, the unanimity instruction could not have affected their deliberative process. Consequently, any error in the instruction was harmless.

C. THE PROPER REMEDY FOR INSTRUCTIONAL ERROR IS A NEW TRIAL, NOT DISMISSAL OF THE WEAPON ALLEGATION.

If this court nevertheless reverses the special verdict, the last question is the appropriate remedy. The defendant claims that the remedy is to strike the special verdict without allowing a new trial. He claims that this remedy was applied in Bashaw. He is wrong. Bashaw simply “vacated” or “reversed” the special verdicts and remanded for “further proceedings consistent with this opinion.” Bashaw, 169 Wn.2d at 147-48 ¶¶ 24-25. It did not specify what those “proceedings” would be.

The usual remedy for erroneous jury instructions is remand for a new trial. See, e.g., State v. Jackman, 156 Wn.2d 736, 745, 132 P.2d 136 (2008); State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). This reflects fundamental considerations of justice:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute

reversible error in the proceedings leading to conviction

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

This observation is particularly applicable to the present case, where no objection was raised to the alleged error and the evidence was overwhelming. It would be unfair to allow defense counsel to use silence (or worse, an affirmative request) to obtain outright dismissal of a weapon enhancement – a result that could not be obtained from any rational jury. This is especially true when the enhancement is the largest part of the sentence. In this case, for example, striking the enhancement would reduce the defendant's sentence from 45 months to 9 months. 1 CP 6.

In Bashaw, the court set out policy reasons why a weapon enhancement should not be retried after a jury fails to agree on the special verdict. The court said that allowing retrials would violate the “policies of judicial economy and finality.” Bashaw, 163 Wn.2d at 146-47. When, however, a defendant successfully challenges his conviction, he loses any right to have that conviction treated as final. See State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006). As for “judicial economy,” it is not a waste of time for a court to

determine whether a person deserves a sentence of 45 months or nine months. Any conclusion that re-trial is an excessive "burden" can only rest on overt hostility to the "Hard Time for Armed Crime" statute.

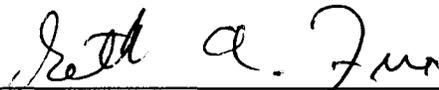
If this court considers the defendant's claims and concludes that the instructions were prejudicially erroneous, the proper remedy is a new trial. Because the defendant has not challenged his conviction for second degree assault, the new trial should be solely on the weapon enhancement.³

IV. CONCLUSION

The judgment and sentence should be affirmed. If it is nonetheless reversed, the case should be remanded for a new trial on the weapon enhancement.

Respectfully submitted on October 22, 2010.

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³ If the defendant received a new trial on the second degree assault charge, he would also be subject to re-trial on the first degree assault charge, since the jury failed to reach a verdict on that charge. Ervin, 158 Wn.2d at 758-59.

INSTRUCTION NO. 16

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~~
verdict forms. 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 First Degree Assault as charged. 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 blank provided in Verdict Form A.

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

You will also be given a special verdict form. If you find the defendant not guilty of these crimes, do not use the special verdict form. If you find the defendant guilty of a crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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".

~~Because this is a criminal case, 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(s).

DEF
PLTF. 19

INSTRUCTION NO. _____

You will also be given a special verdict form First Degree Assault. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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".

WPIC 160.00

APPENDIX B