

COA NO. 65214-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN,

Appellant.



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

The Honorable Michael T. Downes, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICT REQUIRES VACATURE OF THE DEADLY WEAPON ENHANCEMENT.

The State claims the unanimity instruction error cannot be raised for the first time on appeal because it is not constitutional or manifest. Respondent's Brief (RB) at 8-9. The State's claim fails.

The Supreme Court in Bashaw addressed an identical instructional error for the first time on appeal and applied a constitutional harmless test to that error. State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010). The State cannot explain why the Court would have done so if the error was not a manifest constitutional error. The Court cannot be presumed to have disregarded established law on the issue.

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. State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). The failure to provide the defendant with 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.

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 right of jury trial accordingly 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 Boogard and the right to a jury trial as authority for its decision. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003).

The incorrect instruction on unanimity results in a flawed deliberative process. Bashaw, 169 Wn.2d at 147. 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). The instructional error here is constitutional in nature because it violates the constitutional right to a fair jury trial and due process.

An error is manifest if it had practical and identifiable consequences in the case. State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010). This standard focuses on whether the error is obvious on the record. Schaler, 169 Wn.2d at 284; O'Hara, 167 Wn.2d at 99-100.

The manifest standard is satisfied here. Goldberg was decided long before Wiggin's trial. The trial court could have avoided this error by being aware of Goldberg. As a matter of due process, trial courts must be alert to any factor that may undermine the fairness of the fact-finding process. State v. Gonzalez, 129 Wn. App. 895, 901, 120 P.3d 645 (2005).

"This is not a case where a jury instruction merely failed to define a term, or where a trial court did not instruct on a lesser included offense that was never requested." State v. Roberts, 142 Wn.2d 471, 501, 14 P.3d 713 (2000) (instructional error allowing the jury to improperly apply guilt phase accomplice liability principles to penalty phase aggravating factors could be raised first time on appeal). "An appellate court will consider error raised for the first time on appeal when the giving or failure to give an instruction invades a fundamental constitutional right of the accused, such as the right to a jury trial." State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980); accord State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968).

The State nonetheless contends there is no manifest constitutional error here because the unanimous jury resolved the issue of whether Wiggin was armed with a deadly weapon against him in the general verdict. RB at 10-12. In doing so, the State conflates whether the instructional error here is manifest constitutional error with the separate

question of whether the error was harmless. A harmless error analysis occurs only after the court determines the error is a manifest constitutional error. O'Hara, 167 Wn.2d at 99. "The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal." Id.

When assessing the impact of instructional error, reversal is automatic unless the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)). An error is not harmless when the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error. State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). Wiggin stands on the argument advanced in the opening brief that the error here was not harmless beyond a reasonable doubt because it distorted the deliberative process on the special verdict. Appellant's Opening Brief at 8-11.

2. THE JUDGMENT AND SENTENCE NEEDS TO BE CORRECTED TO REFLECT THE ACTUAL INTENTION OF THE TRIAL COURT NOT TO IMPOSE A DRUG-RELATED CONDITION OF COMMUNITY CUSTODY.

The State claims this sentencing error cannot be raised for the first time on appeal. RB at 16-17. The State is wrong. Sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Clerical errors such as the one at issue here may be corrected at any time. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P .3d 353 (2005) (citing CrR 7.8(a) ("clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time")). The remedy is to remand to the trial court for correction of the scrivener's error in the judgment and sentence. Mayer, 128 Wn. App. at 701.

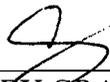
B. CONCLUSION

For the reasons stated above and in the opening brief, Wiggin respectfully requests that this Court vacate the deadly weapon enhancement and remand for correction of the challenged drug-related portion of community custody.

DATED this 14<sup>th</sup> day of January, 2011.

Respectfully Submitted,

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**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 14<sup>TH</sup> DAY OF JANUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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 14<sup>TH</sup> DAY OF JANUARY 2011.

x *Patrick Mayovsky*