

W5243-5

W5243-5

NO. 65243-5-I

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

REC'D

JUN 28 2011

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

PENNY GREEN,

Appellant.

2011 JUN 28 PM 3:41

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

The Honorable Michael C. Hayden, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTION REQUIRING UNANIMITY TO FIND GREEN <i>WAS NOT</i> ARMED WITH A FIREARM REQUIRES VACATION OF THE FIREARM SENTENCING ENHANCEMENT	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Bashaw

169 Wn.2d 133, 234 P.2d 195 (2010)..... 1, 3-4

State v. Nunez

160 Wn. App. 150, 248 P.3d 103 (2011)..... 2-3

State v. Pedro

148 Wn. App. 932, 950, 201 P.3d 398 (2009).....4

State v. Ryan

___ P.3d ___, 2011 WL 1239796 (April 4, 2011)..... 1

State v. Williams-Walker

167 Wn.2d 889, 898-99, 225 P.3d 913 (2010)2

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.6023

A. ARGUMENT IN REPLY

THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTION REQUIRING UNANIMITY TO FIND GREEN *WAS NOT* ARMED WITH A FIREARM REQUIRES VACATION OF THE FIREARM SENTENCING ENHANCEMENT.

In its response brief, the State argues (1) Green waived her challenge to the special verdict because trial counsel did not object to the erroneous instruction; (2) even if Green preserved her claim, any error was harmless because display of a what appeared to be a firearm or deadly weapon was an element of attempted first degree robbery as charged; (3) State v. Bashaw¹ was wrongly decided; and (4) the required remedy is remand for resentencing rather than vacation of the 36-month sentencing enhancement. Brief of Respondent, at 6-17.

This Court recently rejected argument (1) in State v. Ryan, 160 Wn. App. 944, ¶ 13, ___ P.3d ___ (2011). Citing Bashaw, this Court concluded that this instructional error was grounded in due process and could be raised for the first time on appeal.² This Court should follow Ryan and reject the state's claim

¹ 169 Wn.2d 133, 234 P.3d 195 (2010).

² This Court disagreed with Division Three's opinion in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011). Nunez has filed a petition for review from the court's decision that his failure to object to a similarly flawed instruction was a waiver under RAP 2.5(a). His case is

Second, the state's assertion that the trial court's error was harmless lacks merit. As articulated in the Brief of Appellant, our Supreme Court rejected the same reasoning in State v. Williams-Walker, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010). BOA at 10-11. There the trial court incorrectly submitted special verdict forms asking the jury whether defendants Graham and Ruth committed their crimes with a *deadly weapon*, when the instruction should have said *firearm*. Jurors answered "yes" on those forms, despite returning guilty verdicts for first degree assault with a firearm. Williams-Walker, 167 Wn.2d at 898-99. Therefore, as here, the jury found beyond a reasonable doubt the defendants used a *firearm* during commission of their assaults.

The Court rejected the state's argument that firearm sentencing enhancements were authorized because the jury's general verdicts reflected they found beyond a reasonable doubt that firearms were used. To accept this reasoning, the Court found, would be to sanction a trial court's disregard for the statutory requirement that the jury find use of a deadly weapon or firearm by special verdict. Id.

set on the Supreme Court's July 13, 2011, motion calendar. Supreme Court No. 85789-0.

The same is true here. By asking this Court to find the instructional error harmless, the state ignores RCW 9.94A.602, which requires the jury to find a deadly weapon or firearm by special verdict. Although jurors used a correct special verdict form here, the form was infected by instruction 22, which erroneously set forth the standard of proof for determining whether a firearm was used or not used. This Court should acknowledge and give meaning to RCW 9.94A.602 by rejecting the state's argument.

Bashaw provides addition support for Green's position. The Court explained that

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.

Bashaw, 169 Wn.2d 147-48.

In other words, when jurors are told they must be unanimous to answer “no” (or, as here, "was not"), a juror may be hesitant to raise doubts or may abandon his position based on a perception he will not be able to sway every juror to agreement. But when jurors are informed that only one vote – a “no” vote – is sufficient to defeat an affirmative finding, that same juror is more likely to raise the doubt and stand his ground.

Therefore, it is impossible to conclude the error did not affect the jury's special verdicts despite their general verdicts.

The state's third argument, raised to preserve the issue, is that Bashaw was wrongly decided. This Court, however, is bound by that decision. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009).

For these reasons, Green requests that this court strike the tainted firearm enhancement and remand for resentencing.

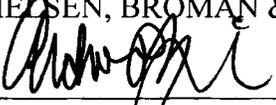
B. CONCLUSION

For the reasons discussed in Green's opening brief and above, this Court should vacate her exceptional sentence and remand for resentencing.

DATED this 28 day of June, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 48631
Office ID No. 91051
Attorneys for Appellant