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No. 65253-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TONY HERNANDEZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

THE COURT'S FAILURE TO EXPLAIN THE
UNANIMITY REQUIRED FOR A SPECIAL VERDICT
SENTENCING ENHANCEMENT DENIED
HERNANDEZ HIS RIGHT TO A FAIR TRIAL BY
JURY

The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Regarding special verdicts, the jury does not have to be unanimous to find that the State had not proven the special finding beyond a reasonable doubt. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003).

The prosecution claims that Hernandez cannot raise the plain error in his jury instructions defining the unanimity required for the sentencing enhancement because he did not object to the instruction proposed by the prosecution, which required the jurors to answer unanimously, regardless of whether the answer was yes or no. Supp. CP __, sub. no. 24A (State's proposed instructions).

The prosecution argues that the issue is not “manifest constitutional error,” because, even though the error is obvious, i.e., manifest, and predicated on the State’s request not Hernandez’s, the resulting prejudice is not clear. Response Brief, at 5-7.

However, in Bashaw, “[t]here was no objection to the instruction” regarding the unanimity required for the special verdict form sentencing enhancement. 144 Wn.App. 196, 199, 182 P.3d 451 (2009), reversed on review, 169 Wn.2d at 146.¹ In Bashaw, the trial court polled the jury and the jury said its verdict was unanimous, but the Supreme Court found the fundamental, structural nature of the incorrect explanation about the deliberative process denied Bashaw a fair trial. Id. The prosecution does not explain why this Court should not follow the reasoning and holding of the Supreme Court when addressing the same issue.

In Bashaw, the Court ruled such an error is not harmless even where the jury was polled and the jurors uniformly affirmed their verdict:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

...

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . 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.

169 Wn.2d at 147-48 (emphasis added).

The prosecution tries to craft Bashaw and Goldberg as rooted on some sort of “policy” decision that lacks a footing in fundamental rights. Response Brief at 8. But Bashaw and Goldberg are predicated on the right to trial by jury, an “inviolable” right guaranteed and strictly protected by the Washington Constitution, article I, sections 21 and 22. State v. Williams-Walker, 167 Wn.2d 889, 895-96, 225 P.3d 913 (2010). The jury’s verdict must authorize the punishment imposed. Id. at 899. This is not a fly-by-night policy consideration, as the prosecution posits.

Hernandez did not set up this error. He did not seek a jury instruction that misrepresented his right to a unanimous jury verdict.

In addition, as in Bashaw, the error was not harmless since it is impossible to determine what would have occurred had the jury

¹ The Court of Appeals decision in Bashaw provides further details regarding the instructional issue and nature of objections lodged,

been properly instructed. In Williams-Walker, 167 Wn.2d at 899, the Court held that guilty verdicts cannot authorize sentence enhancements.

We decline to hold that guilty verdicts alone are sufficient to authorize sentence enhancements. If we adopted this logic, a sentencing court could disregard altogether the statutory requirement that the jury find the defendant's use of a deadly weapon or firearm by special verdict. Such a result violates both the statutory requirements and the defendant's constitutional right to a jury trial.

Id.

Finally, the State claims that Bashaw and Goldberg are wrong about the requirement of unanimity for a sentencing enhancement. Response Brief, at 9-10. Its argument rests on a reversal of the rules of statutory construction. It claims that the absence of specific language in a sentencing statute that the jury's verdict voting "no" may be less than unanimous requires this Court to presume, from that silence, that verdicts in sentencing enhancements must be unanimous, even if voting "no."

If a statute's language is ambiguous, the rule of lenity requires the court to interpret the language in the light most favorable to the accused. City of Aberdeen v. Regan, __ Wn.2d __ , 239 P.3d 1102, 1108 (2010). The prosecution does not say the

language is ambiguous here, but rather says it is silent and this Court should construe that silence to mean that unanimity is required for sentencing enhancements, even when voting against the enhancement. In Goldberg, the Supreme Court found that the trial court lacked authority to demand the jury reach a verdict unanimously for an enhancement. 149 Wn.2d at 894. If Goldberg fundamentally misconstrued the requirement of unanimity, the legislature has, by its silence the past seven years, not revisited that issue and thus is deemed to have acquiesced. Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n, 148 Wn.2d 887, 905 n.14, 64 P.3d 606 (2003).

In Bashaw, the Supreme Court thought it absurd that the State would hold re-trials on sentencing enhancements when they received the verdict sought on the predicate offense and the jury was undecided as to whether the State proved the enhancing factor. 169 Wn.2d at 146. The Bashaw Court put a premium on finality, and unanimity, which the State disregards without explanation.

The State's desire to overrule Bashaw is not properly raised here. Moreover, the decision in Bashaw is firmly rooted in our state's respect for jury trials, as well as for judicial economy.

The jury's verdict does not reflect the statutory requirements of the sentencing enhancement as well as the constitutional right to a jury trial. Williams-Walker, 167 Wn.2d at 899. This Court should vacate the special verdict finding. Bashaw, 169 Wn.2d at 148.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hernandez respectfully requests this Court remand his case for further proceedings.

DATED this 16th day of December 2010.

Respectfully submitted,



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

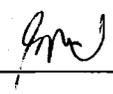
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65253-2-I
v.)	
)	
TONY HERNANDEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> TONY HERNANDEZ 340019 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 1899 AIRWAY HEIGHTS, WA 99001-1899	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF DECEMBER, 2010.

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