

NO. 65253-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TONY HERNANDEZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

The court improperly instructed the jury that its verdict must be unanimous in deciding whether the State proved the aggravating factor in the special verdict form.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. The trial court instructed the jury that it could not find the State had failed to meet its burden of proof unless it reached this decision unanimously. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect instruction undermine the jury's special verdict finding?

D. STATEMENT OF THE CASE.

From the third floor of a building overlooking a park, police officer Mark Grinstead believed he saw Tony Hernandez engage in several drug transactions. 1RP 36-37, 42, 45-49. At Grinstead's request, a fellow officer arrested a well-known drug user named George Lill, who Grinstead saw engage in an interaction with Hernandez. 1RP 42, 73, 89. The officer found narcotics in Lill's possession. Id. Upon Hernandez's arrest, the officers found loose, unpackaged crack cocaine in Hernandez's glove. 1RP 118-19.

The State charged Hernandez with one count of delivery of a controlled substance and one count of possession of a controlled substance with the intent to deliver, both occurring while in a public park. CP 8-9. The two park enhancements increased the punishment the court could impose. RCW 69.50.435.

Hernandez testified that he was poor and homeless and was looking for a pipe he could use to smoke the drugs he had purchased. 2RP 166-69, 194. He admitted possessing the drugs but explained that it was for himself and he did not sell it to anyone else. 2RP 167, 170.

Hernandez was convicted of the charged offenses, including the sentencing enhancements. CP 38-41. The court imposed a prison-based DOSA sentence. CP 77. He timely appeals.

E. ARGUMENT.

THE COURT GAVE A FATALLY FLAWED
UNANIMITY INSTRUCTION FOR THE
SENTENCING ENHANCEMENT USED IN THE
SPECIAL VERDICT FORM

1. The court must properly instruct the jury on the unanimity required for an aggravating circumstance. When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently

proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form addressing an additional aggravating factor must be unanimous for either a “yes” or “no” answer. Bashaw, 169 Wn.2d at 139; Goldberg, 149 Wn.2d at 894. The Supreme Court held that such an instruction is incorrect, and unanimity is required only when the jury answers “yes.”

The rule from Goldberg¹ then, is 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.

¹ In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either “yes” or “no.” 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

The jury instruction given in Bashaw for the special verdict form told the jurors, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. The Bashaw Court held that jurors need not be unanimous in a special finding. Rather, any jury’s less than unanimous verdict “is a final determination that the State has not proved that finding beyond a reasonable doubt.” Id. at 145.

Similarly to Bashaw, the trial court told Hernandez’s jury that their special finding must be unanimous to decide the sexual motivation aggravating factor either “yes” or “no.” The court’s instruction directing the jury to consider the special verdict form stated in pertinent part,

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 36 (Instruction 21).

The jury instruction in the case at bar presents the identical error identified in Bashaw. The court erroneously told the jury that they could not vote “no” in the special verdict form unless they were

unanimous in finding the State had not proven the aggravating factor contained in the special verdict.

2. The clearly incorrect jury instruction requires reversal of the special verdict. The court in Bashaw characterized the problem as an error in “the procedure by which unanimity would be inappropriately achieved.” 169 Wn.2d at 147. This instructional error creates a “flawed deliberative process” and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id.

The Court in Bashaw looked to the example of the deliberative process in Goldberg, where several jurors had initially answered “no” to the special verdict, but after the trial judge told them they must be unanimous, they returned with a “yes” finding on the aggravating factor. Id.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id. As in Bashaw, the jury was incorrectly informed that their special verdict finding of sexual motivation must be unanimous. CP 21. The precise location of the

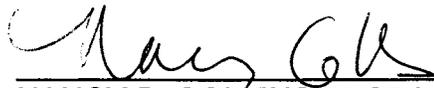
alleged drug sale and whether the conduct occurred within the boundaries of the park were factually disputed at trial. See RP 158-59, 172, 192. This Court may not guess the outcome of the case had the jury been correctly instructed, and thus the special findings imposing additional punishment because the incident occurred in a public park must be stricken. Bashaw, 169 Wn.2d at 147; CP 38-39.

F. CONCLUSION.

For the foregoing reasons, Mr. Hernandez respectfully requests this Court reverse and dismiss the enhancement imposed based on the flawed deliberative process caused by the incorrect unanimity instruction.

DATED this 20th day of September 2010.

Respectfully submitted,



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DIVISION ONE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING 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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HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF SEPTEMBER, 2010.

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