

NO. 65253-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TONY HERNANDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. An issue may not be considered for the first time on appeal unless the error involves manifest constitutional error. Hernandez challenges a jury instruction for the first time on appeal and cannot show that the assigned error implicates a constitutional right. Has Hernandez waived his challenge to the jury instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Tony Hernandez was charged by information with Violation of the Uniform Controlled Substances Act ("VUCSA"); specifically, the State alleged that Hernandez delivered cocaine to another person on November 13, 2009. CP 1-5. The State subsequently amended the information to add a second count of VUCSA, alleging that on the same day, Hernandez also possessed cocaine with the intent to deliver it. CP 8-9. On both counts, the State alleged public park sentencing enhancements. CP 8-9.

Trial occurred in March of 2010. A jury found Hernandez guilty as charged. CP 38-41. The court granted Hernandez's request for a prison-based Drug Offender Sentencing Alternative ("DOSA"). CP 74-83.

2. SUBSTANTIVE FACTS

Victor Steinbrueck Park, which is located at the northwest end of Pike Place Market, is owned by the City of Seattle and has been operated as a public park since 1981. 2RP 154.¹ The park is a busy area, frequented by tourists. 2RP 155. It has also become known for heavy narcotics activity, and the Seattle Police Department conducts regular narcotics surveillance operations there in an attempt to deter such behavior. 1RP 36.

On November 13, 2009, Seattle Police Officers Mark Grinstead and Tad Willoughby were conducting surveillance of Victor Steinbrueck Park from a nearby building. 1RP 36-37, 107-09. Willoughby saw multiple people contact Hernandez. Willoughby asked Grinstead to watch Hernandez through his binoculars. 1RP 108. Together, Willoughby and Grinstead saw Hernandez conduct three hand-to-hand transactions.

In the first transaction, both Willoughby and Grinstead saw Jason Schumacher, a known narcotics user, approach Hernandez and engage in a short conversation. 1RP 42, 110. Using his

¹ The verbatim report of proceedings consists of two consecutively numbered volumes. In order to be consistent with the Brief of the Appellant, the volumes will be referred to in this brief as follows: 1RP (February 26, 2010 and March 1-2, 2010) and 2RP (March 3, 2010 and April 9, 2010).

binoculars, Grinstead saw Schumacher hand Hernandez cash and, in response, Hernandez peeled back his left glove and handed Schumacher a piece of suspected crack cocaine. 1RP 42-43.

After Schumacher left, Hernandez sat down on one of the benches running along the side of the park. 1RP 44. This time, George Lill, an individual familiar to both officers, sat down next to Hernandez on the bench and handed him some money. 1RP 45, 113. Hernandez handed Lill a small object from inside his left glove. 1RP 45. Lill placed the object in his left jacket pocket and walked away. 1RP 46.

Willoughby contacted the arrest team and had them arrest Lill. 1RP 114. Officer Randall Jokela, who knew Lill from many past contacts, responded. 1RP 72. During his search of Lill, Jokela found a piece of crack cocaine inside his left jacket pocket. 1RP 73.

While Lill walked away, Hernandez remained seated on the bench. An unknown man sat down on the bench and Hernandez again rolled back his left glove. 1RP 48. Grinstead saw the man pick a small object from Hernandez's hand, but did not see whether any money was exchanged. 1RP 49.

After this third transaction, the surveillance officers asked the arrest team to detain Hernandez. Jokela placed Hernandez under arrest and, during a search incident to arrest, Grinstead found several pieces of crack cocaine inside Hernandez's left glove and another piece in his left coat pocket. Hernandez also had \$126 in cash on him. 1RP 54, 77-80.

Both the drugs found on Hernandez and the rock found on Lill were cocaine. CP 6-7.

C. ARGUMENT

1. THE COURT SHOULD REJECT HERNANDEZ'S
BELATED CHALLENGE TO THE SPECIAL
VERDICT INSTRUCTION

Relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Hernandez argues that the public park sentencing enhancements should be reversed and dismissed because the special verdict instruction told the jury that it must be unanimous in order to answer "no." Hernandez failed to object to the instruction at the time it was offered. Because the jury instruction is not a manifest error affecting a constitutional right, Hernandez waived this argument by failing to preserve the objection.

a. Related Facts

The court provided the jury with special verdict forms for the public park sentencing enhancement for each count.² CP 38-39.

In regards to the special verdict forms, the court instructed the jury:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "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. This instruction is identical to WPIC 160.00. Although Hernandez made several suggestions regarding other proposed jury instructions, he did not object or take exception to the instruction at issue. RP 133-47, 150-52, 196.

b. Hernandez Has Waived Any Challenge To The Special Verdict Instruction

Under CrR 6.15(c), objections to proposed jury instructions must be made before the court instructs the jury, so as to allow the trial court the opportunity to correct any error. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492, 494 (1988). Before error can be

² Despite the references in Appellant's Brief to a "sexual motivation aggravating factor," the public park enhancement was the only aggravator or enhancement involved in this case.

claimed on the basis of a jury instruction given by the trial court, the appellant must show that a timely objection was made in the trial court. State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246, 1250 (1995).

Similarly, under RAP 2.5(a)(3), appellate courts may consider an issue raised for the first time on appeal only when it involves a "manifest error affecting a constitutional right." To raise an issue not previously preserved, an appellant must show that (1) the error is manifest, and (2) the error is truly of constitutional dimensions. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Hernandez must first identify a constitutional error and then must show how the asserted error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Only after the court determines that the claim does in fact raise a manifest constitutional error does it move on to a harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not all instructional error rises to the level of manifest constitutional error. Examples of manifest constitutional errors in jury instructions include: shifting the burden of proof to the defendant, State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d

1064 (1983); failing to define the "beyond a reasonable doubt" standard, State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); and omitting an element of the crime charged, State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds*, State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). On the other hand, failure to instruct on a lesser included offense, State v. Mak, 105 Wn.2d 692, 745-49, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); and failure to define individual terms, State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492, 495 (1988), are examples of instructional error that do not fall within the scope of manifest constitutional error.

Hernandez relies heavily on Bashaw and its interpretation of State v. Goldberg. Bashaw was charged with three counts of delivering a controlled substance. The State further alleged that the deliveries occurred within 1000 feet of a school bus stop. The court instructed the jury that "since this was a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held 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." 169 Wn.2d at 146.

In explaining its ruling, the Bashaw court explicitly acknowledged that the claimed error was not of a constitutional magnitude. "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), *cert. denied*, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." Bashaw, at 146 n.7. Instead, the common law rule adopted in Goldberg and reaffirmed in Bashaw is based on policy considerations. Noting that the costs and burdens of a new trial are substantial, the court reasoned that, where a defendant is already subject to a penalty for the underlying offense, "the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality." Id. at 146-47.

Hernandez does not acknowledge his failure to object to the instruction below and is unable to show that the issue raised is of

constitutional magnitude. He has therefore waived his challenge to this instruction.

c. The Rule In Bashaw Is Contrary To Legislative Intent

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, §§ 21 and 22. Const. art. I, § 21, which provides that "[t]he right of trial by jury shall remain inviolate", preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The right to a unanimous verdict in a criminal case is not reserved for the benefit of the defendant. Just as the State could not waive the unanimity requirement for a guilty verdict, a defendant cannot waive the unanimity requirement for acquittal. State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966). In Noyes, the defendant's first trial resulted in a hung jury in which the jury had voted 11 to 1 for acquittal. The defendant was convicted in a second trial and on appeal argued that he could waive a unanimous verdict and accept the vote of 11 jurors as an acquittal. The court rejected this notion, characterizing it as "without merit." Id. at 446.

When the legislature enacts a statute, it is presumed to be familiar with judicial interpretations of statutes. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610, 619 (2000). This presumption applies to the court's rulings on jury unanimity. Only RCW 10.95.080(2), which governs sentencing of aggravated first degree murder, assigns meaning to a non-unanimous verdict. All other sentencing statutes remain silent on the issue. Thus, for all other

sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

D. CONCLUSION

For the reasons cited above, this Court should affirm Hernandez's enhanced sentence.

DATED this 15 day of November, 2010.

Respectfully submitted,

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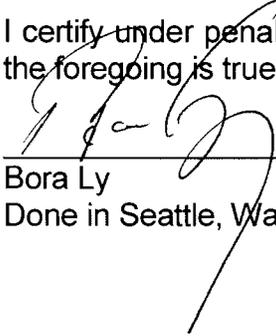
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. TONY HERNANDEZ, Cause No. 65253-2-I, in the Court of Appeals, Division I, for the State of Washington.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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