

65538-8

65538-8

NO. 65538-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARIO PETRILLI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KATHY K. UNGERMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

COURT OF APPEALS
STATE OF WASHINGTON
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A. ISSUES RAISED ON APPEAL

1. A firearm enhancement is imposed when a jury unanimously finds beyond a reasonable doubt that the defendant committed the crime charged with a firearm. At trial, a jury found Petrilli guilty of assault in the second degree based on the deadly weapon prong after he fired a gun at the victim. In addition, the jury unanimously found that Petrilli committed this crime with a firearm. Was the special verdict instruction for the firearm enhancement an incorrect statement of the law by stating, "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'" and Petrilli failed to object?

2. A scrivener's error was made in calculating the total fine imposed. That error was corrected in an Order Amending the Judgment & Sentence. Is Petrilli's argument moot since the error has already been corrected?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The King County Prosecuting Attorney's Office charged Petrilli with two counts of assault in the second degree (each with a firearm enhancement) and one count of assault in the third degree. CP 8-9. At trial, the jury convicted Petrilli of one count of assault in the second degree with a firearm enhancement and one count of assault in the third degree. CP 52-55. At sentencing, the court imposed a standard range sentence plus an additional 36 months for the firearm enhancement. CP 72.

2. SUBSTANTIVE FACTS

On the night of February 19, 2010, David Kline went to Paul May's house to help him move out of a basement room he had been renting from Petrilli. 3RP 59-60, 79-80. Kline and Petrilli had consumed beer. 3RP 82. Petrilli attacked Kline with his fists, a stun gun, and a metal bar. 3RP 84, 87; 7RP 145. Both Kline and May testified that the defendant was holding the metal bar during the fight, but neither was sure if he actually struck Kline with the metal bar. 4RP 94-94; 5RP 16.

Kline ran out the back door to his truck. 4RP 96. Petrilli ran upstairs, grabbed his gun and then ran out on the front deck. 4RP 97. Petrilli yelled at Kline to get off his property. 4RP 101. Kline responded, "I'm going!" 4RP 101. Petrilli replied "Not fast enough!" and fired his gun at Kline. 4RP 101. May observed Petrilli fire one shot at Kline then cock the gun again while keeping aim on Kline. 4RP 97, 100-01, 103. Kline drove off and called 911 within moments. 5RP 26.

Police arrived and arrested Petrilli. 5RP 116, 135, 145. Post-Miranda, Petrilli admitted he owned guns, but did not disclose the black handgun that police found in a hidden compartment inside the headboard of his bed. 6RP 14-16; 7RP 155-56. A cartridge casing from the black handgun was found on top of the deck. 6RP 51, 54, 68.

C. ARGUMENT

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

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Petrilli challenges the instruction for the firearm enhancement, arguing that the jury should not have been

told that it had to be unanimous in order to answer "no." However, since Petrilli did not object to this instruction in the trial court, he has waived this issue on appeal. Even if the issue is not waived, the rule in Bashaw does not apply to the firearm enhancement because, unlike the school bus stop enhancement at issue in that case, the relevant statute expressly requires jury unanimity for a "no" finding. In addition, unlike Bashaw where it was unknown whether the jury was unanimous, the jury in the present case was unanimous that a firearm was used during the commission of this crime - the jury unanimously found Petrilli guilty of Assault in the Second Degree based on the deadly weapon prong for shooting a gun at the victim.

a. Relevant Facts.

The court provided the jury with a special verdict form for the firearm enhancement. The instruction for 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 49 (Instruction No. 21). This instruction is identical to WPIC 160.00. The trial court asked whether Petrilli took any exception to the instructions, and his attorney replied that she did not. 7RP 187. In addition, the record reflects that the defendant did not object to the special verdict instruction.

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

According to recent case law from Division III, a trial court's failure to instruct the jury that it could acquit a defendant of the aggravating factor nonunanimously is "not an error of constitutional magnitude." State v. Nunez, __ Wn. App. __, __ P.3d __, 2011 WL 505335 (February 15, 2011).

A defendant may not challenge a concluding instruction that directed the jury that in deciding whether the defendant committed the aggravating factor of selling a controlled substance within 1,000 feet of a school bus route stop, "all twelve of you must agree on the answer to the special verdict," for the first time on appeal. State v. Nunez, __ Wn. App. __, __ P.3d __, 2011 WL 505335 (February 15, 2011).

Petrilli has not identified a single constitutional provision violated by the trial court's use of the concluding instruction and failed to preserve the issue for appeal since he did not object at trial.

Even if the court finds the error to be of constitutional magnitude, under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Petrilli must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

The case cited by Petrilli, Bashaw, makes clear that the claimed error is not of constitutional dimension. Bashaw was charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. The special verdict form for the sentencing enhancement stated: "Since this is 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 so holding, the court acknowledged that this rule was not of constitutional dimension. "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." 169 Wn.2d at 146 n.7. Instead, the court cited policy justifications for this common law rule:

The rule we adopted in Goldberg and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right'

to have the charges resolved by a particular tribunal." [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Id. at 146-47.

Since Petrilli failed to preserve the issue for appeal by failing to object to the instruction and the error is not of constitutional magnitude, the court should reject Petrilli's challenge to the special verdict instruction.

c. The Special Verdict Instruction Was A Correct Statement Of The Law For The Firearm Enhancement.

Even if the issue was not waived, Petrilli cannot show that the special verdict instruction was erroneous with respect to the firearm enhancement because the relevant statute requires jury unanimity for any kind of verdict. Bashaw involved a school bus stop sentencing enhancement,¹ and the relevant statute is silent as

¹ Goldberg, the case cited in Bashaw, also did not involve an exceptional sentence aggravating circumstance; rather, it was an aggravated first-degree murder case and involved aggravating circumstances under RCW 10.95.020. 149 Wn.2d at 694-95.

to whether the jury must be unanimous before they may answer "no" to the special verdict. See RCW 69.50.435.

In contrast, the statute governing the firearm enhancement requires jury unanimity for any verdict. Under RCW 9.94A.533(3)(b), three years is added to the standard range sentence for a class B felony when an offender is found to be armed with a firearm. The United States Supreme Court in Apprendi, held that other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In Blakely, the Court clarified "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

Moreover, the Supreme Court defers to the legislature's policy judgment with respect to the exceptional sentence

procedures, State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008), and the legislature has made it clear that the policy justification for the common law rule discussed in Bashaw does not apply to aggravating circumstances. As discussed above, the Bashaw court held that the reason that unanimity was not required for a "no" finding was because, in the court's opinion, the costs and burdens of conducting a second trial on a sentencing enhancement outweighed the interest in imposing the additional penalty on a defendant. However, with respect to aggravating circumstances, the legislature has indicated that the imposition of an appropriate exceptional sentence outweighs any concern about judicial economy or costs. When an exceptional sentence is imposed but is subsequently reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating circumstances alone. RCW 9.94A.537(2).² This policy judgment is not surprising, because exceptional sentences are reserved for the worst offenders. When the jury finds an aggravating circumstance, the trial court has the discretion to impose a sentence up to the

² In this case, if this Court were to reverse Petrilli's exceptional sentence based upon Bashaw, the State would be entitled to again seek an exceptional sentence at a new trial on the aggravating circumstance.

statutory maximum. In contrast, the Supreme Court characterized the school bus zone sentencing enhancement as simply "an additional penalty" imposed upon a defendant "already subject to a penalty on the underlying offense." Bashaw, 169 Wn.2d at 146-47. Bashaw does not apply to aggravating circumstances, such as the firearm enhancement, and the special verdict form accurately stated the law.

d. 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 Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. The legislature gave force or meaning to a non-unanimous verdict in only one sentencing statute concerning aggravated first-degree murder. See RCW 10.95.080(2). 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.

2. PETRILLI'S ARGUMENT REGARDING THE SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE IS MOOT SINCE THE DOCUMENT HAS ALREADY BEEN AMENDED.

Petrilli identifies a scrivener's error in the judgment and sentence which incorrectly states the total fine due as \$1,465.99. An order amending this error in the judgment and sentence was filed on July 30, 2010. This order identified the correct amount of \$1,065.00.

D. CONCLUSION

In conclusion, for the reasons stated above, the State respectfully requests Petrilli's conviction be affirmed.

DATED this 25 day of February, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

KATHY K. UNGERMAN, WSBA #32798
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MARIO PETRILLI, Cause No. 65538-8-I, in the Court of Appeals, Division I, for the State of Washington.

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

Betty A. Huddleston

Name

Done in Seattle, Washington

2/25/11

Date