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NO. 65736-4-I

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

REC'D
APR 28 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JAMES WISE,

Appellant.

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

The Honorable Laura C. Inveen, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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

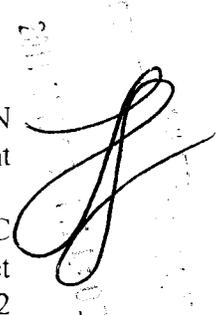


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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective representation when trial counsel failed to request a jury instruction explaining that choosing not to assault his mother is a defense against the charged crimes.

2. Appellant's counsel was also ineffective for proposing an instruction ultimately given by the court, telling the jury it must be unanimous to answer the special verdict form. CP 51 (Instruction 27).

Issues Pertaining to Assignments of Error

1. The jury was instructed to consider convicting appellant of three potential offenses: first degree manslaughter; second degree felony murder predicated on first degree criminal mistreatment; and second degree manslaughter. The jury convicted appellant of second degree manslaughter. The basis for the three offenses was appellant's alleged failure to provide his 88-year old mother with appropriate medical treatment for various ailments during the last month of her life. Appellant agreed he did not provide his mother with the medical treatment deemed appropriate by the State, but claimed it was because his mother specifically said she did not want it. Was trial counsel ineffective for failing to request an instruction explaining that appellant was absolved of any criminal liability for failing to provide his mother with medical treatment if providing such treatment would have

constituted an assault?

2. It is error to instruct jurors they must be unanimous in order to find the State has failed to satisfy the requirements of a sentencing enhancement. Appellant's jury received such an instruction. Was trial counsel ineffective for proposing this erroneous instruction?

B. STATEMENT OF THE CASE

Appellant Christopher ("Chris") Wise was born in California on January 31, 1968, and adopted two days later by Ruby and Orey Wise, who were 47 and 48 years old at the time, respectively.¹ 2RP² 1619, 1624. The family moved to Florida in 1979. 2RP 1621, 1624. After graduating high school in 1986, Chris attended college in California, earning a degree in computer engineering. 2RP 1628-30. In 1987, while Chris was at college, Orey passed away from pancreatic cancer at age 67. 2RP 1633. Before his death, however, Chris promised Orey he would take care of Ruby in Orey's absence. 2RP 1634.

Chris moved to Washington in 1992 to pursue employment in the

¹ For clarity, member of the Wise family are referred to by their first names. No disrespect is intended.

² There are nineteen volumes of verbatim report of proceedings referenced as follows: 1RP - April 2, 2010; 2RP - consecutively paginated 14-volume set for the dates of April 12-15, 19-22, 26, 2010, and May 3, 5, 6, 10, 11, 2010; 3RP - two-volume consecutively paginated set for the dates of April 28-29, 2010; 4RP - May 4, 2010; and 5RP - July 16, 2010 (sentencing).

computer software industry. 2RP 1631-32. In August 1999, when she was about 78 years old and had to use a cane to get around, Ruby moved to Washington to be closer to Chris. 2RP 1643; Ex. 52 (transcript of Chris's statement to law enforcement on June 16, 2009) at 4.

Three weeks after she arrived in Washington, Ruby fell and broke her hip. 2RP 1644. After surgery and physical rehabilitation at an adult care facility, it was decided Ruby would live with Chris rather than on her own. 2RP 1658-59. Ruby fell and broke her hip again in 2003, and once again returned to the adult care facility for physical rehabilitation. 2RP 1668. When she was release she told Chris "that she never wanted to set foot in another nursing home, because she didn't like the way she was treated[.]" 2RP 1671.

After Ruby and Chris started living together, Chris quit working and he and his mother lived on the money Ruby received in social security benefits and disability payments.³ 2RP 1664. In September 2004, they moved to a rental house on a small lake near Black Diamond. 2RP 1673. By that time Ruby used a walker to get around. Ex. 52 at 7.

Over the next several years Ruby's physical and mental health

³ Ruby Wise received payments every two weeks from a disability insurance policy as a result of an on-the-job accident in Florida in 1985. 2RP 954, 1592, 1638-39; 3RP 88; Ex.53 (transcript of Chris's statement to law enforcement on June 17, 2009) at 15.

declined. For example, Chris noticed Ruby got progressively more "loopy" mentally in that she began talking to herself more and more, and her short-term memory failed her more and more over time. Ex. 53 at 6-12. By late 2007 or early 2008, Ruby was incontinent and had to wear adult diapers. 2RP 1767; Ex 53 at 19. At some point it was determined Ruby's eyesight was failing due to cataracts, but she refused to go through the surgery to repair them. 2RP 1703.

In November 2008, Ruby fell out of her bed and, concerned she may have been hurt, Chris called 911 and had Ruby taken to the hospital. 2RP 873, 1706. Ruby returned home a few hours later, but from that point forward Chris saw a rapid decline in his mother's overall health that required her to receive increased assistance with virtually all aspects of her life, from eating to bathing to voiding her bladder and bowels. 2RP 1707, 1713-14, 1722-23; Ex. 52 at 13-17. Chris also noted a decline in her mental capacities, but felt she was still capable of making her own decisions. 2RP 1715-16; Ex. 53 at 21. In early 2009, Ruby told Chris she was ready to join Orey, that she wanted to die at home, not a hospital or nursing home, and that she did not want anyone except Chris caring for her. 2RP 1671-72; 1726.

By May 2009, Ruby could not get out of bed without Chris's assistance, and had to be bathed while still in bed. 2RP 1722-23. By early

June 2009, Ruby could not longer get out of bed, was declining food and water, and did not want Chris to change her diaper or clean the bed sores that were developing on her body. 2RP 1698, 1728-29. In an effort to promote Ruby's comfort over all else, Chris gradually lessened the amount of times he changed her diaper or cleaned her bed sores, which had gotten quite extensive by the second week of June. 2RP 1726, 1732-33.

Early in the morning on June 16, 2009, Chris called 911 to report Ruby had died. 2RP 1739. An autopsy concluded Ruby's death was caused by "Multiple deep pressure ulcers" (bed sores) and exacerbated by cardiovascular disease, cerebral atrophy, emaciation and dehydration. Ex. 100 (Certificate of Death).

After law enforcement investigated Ruby's death, the King County Prosecutor charged Chris with first degree manslaughter, alleging he had recklessly caused Ruby's death. The information also alleged as an aggravating circumstance that Ruby was particularly vulnerable to the charged offense. CP 1; RCW 9A.32.060(1)(a); RCW 9.94A.535(3)(b). The prosecutor subsequently filed an amended information adding a count of second degree felony murder predicated on the felony of first degree criminal mistreatment. CP 13-14; RCW 9A.42.020.

A jury trial was held April 12 through May 11, 2010, before the Honorable Laura C. Inveen. 2RP-4RP. The jury acquitted Chris of the

charged offenses, but convicted him of the lesser included offense of second degree manslaughter. CP 161-63; 2RP 1880-81. The jury also concluded Chris knew or should have known Ruby was particularly vulnerable or incapable of resistance. CP 164; 2RP 1881. The court sentenced Chris to 27 months, plus an additional 12 months for the aggravating factor (for a total of 39 months), and included an 18-month term of community custody. CP 170-77; 5RP 24-25. This appeal timely follows. CP 178-86

C. ARGUMENT

1. COUNSEL'S FAILURE TO PROPOSE INSTRUCTIONS EXPLAINING CHRIS DID NOT HAVE TO PROVIDE RUBY WITH THE BASIC NECESSITIES OF LIFE IF TO DO SO WOULD CONSTITUTE AN ASSAULT DEPRIVED CHRIS OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Chris testified consistently with what he told law enforcement immediately after Ruby died; that he simply complied with his mother's desire to die in the comfort of her own home, in her own bed, in the presence of only her son. More specifically, Chris explained that during the last weeks of Ruby's life she made it clear she did not want her bed sores treated because such treatment was too uncomfortable for her to bear. Defense counsel emphasized this explanation in closing argument, repeatedly noting that Chris loved his mother and was simply following her wishes. 2RP 1829, 1842, 1846, 1849, 1855, 1864. Defense counsel also noted in closing

that individuals have the right to refuse medical care, and that a caregiver who honors that refusal is not a criminal. 2RP 1848.

Despite Chris's testimony and the overall defense strategy, defense counsel failed to propose instructions supporting the associated legal principle that it is a defense against an allegation of failure to provide medical treatment if to do so would have constituted an assault. Because the evidence warranted such instructions, counsel's failure to propose them deprived Chris of his constitutional right to effective assistance of counsel, and this Court should therefore reverse his conviction.

An accused is denied the right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)).

Due process requires jury instructions be sufficient to (1) allow the parties to argue their respective case theories that are supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Washington courts have found defense counsel ineffective for failing to propose appropriate instructions. State v. Kylo, 166 Wn.2d 856, 866-69, 215 P.3d 177 (2009) (deficient performance for failing to propose a proper “act on appearances” instruction); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) (counsel ineffective for failing to propose instruction setting forth correct law for a diminished capacity defense).

It is a defense to a charge of manslaughter based on failure to provide medical treatment, that provision of the medical treatment by the accused would have constituted an assault of the deceased. State v. Koch, 157 Wn. App. 20, 33-34, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011); see also In Re Colyer, 99 Wn.2d 114, 121, 660 P.2d 738 (1983) (treatment without authorization constitutes an assault).

In Koch, James Lloyd (James) was accused of manslaughter and criminal mistreatment for the death of his 86-year-old father, Lloyd Koch (Lloyd). Lloyd was described as "a stern and private man who repeatedly told his adult children that he wished to die at home, where his wife had passed in 1996, without outside interference." 157 Wn. App. at 24. Lloyd's hygiene practices late in life were abysmal, and, aware his father would decline assistance from his children, James arranged for outside help to clean his father. When those who came to clean Lloyd saw his dismal condition, which included "dried and fresh fecal matter on his thighs and

back, bedsores on the backs of his legs, and maggots on his feet," they called 911 and had Lloyd hospitalized, "where he was treated for moderate to severe dehydration, tachycardia, bed sores, urine burns, high blood sugar, and shock." 157 Wn. App. at 26-27. Lloyd died a week later from congestive heart failure caused by aggressive medical rehydration, which was deemed necessary due to Lloyd's history of insufficient fluid intake, increased urination from diabetes, and fluid loss through bedsores. 157 Wn. App. at 27.

When interviewed by police, James explained he had taken responsibility for several aspects of Lloyd's life, including paying his property taxes and providing him with meals. James explained that despite a verbal agreement with his father, Lloyd had repeatedly and vehemently refused care. *Id.* James explained at trial that he although he was aware of the health risks to his father, he deliberately chose not to force treatment on him because he did not want to hurt his father or go against his wishes that there be no medical intervention. 157 Wn. App. at 38. Despite this statement, the court refused to give a defense proposed "assault defense" instruction that provided:

It is unlawful to use physical force . . . upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life.

157 Wn. App. at 28.

This Court reversed James' second degree manslaughter conviction, noting that under the circumstances the jury must have concluded James knowingly or recklessly failed to provide James with needed medical care.

The Court reasoned:

For [James] to be convicted of second degree manslaughter because he “knowingly” withheld care from his father, the jury would have to have been convinced that either (i) he knew not forcing care on his father would constitute a crime or (ii) a person in his situation had reason to know his actions would constitute a crime. The mental states of “knowingly” and “recklessly,” . . . required the trial court to instruct the jury about [James'] “assault defense” so it could evaluate the legal ramifications of [James'] reasons for withholding aid to his father under the circumstances in which [James] found himself with respect to his father. Without this instruction, [James] was not able to negate the subjective culpability element of knowledge or recklessness, which the State had to prove to convict him.

157 Wn. App. at 39-40 (citation omitted).

As in Koch, Chris's explanation for not being more aggressive in treating Ruby's bed sores and other ailments was that Ruby did not want treatment. Just as James did not want to assault his father, Chris did not want to assault his mother by making her endure painful treatment for her bed sores during her last month of life when all she wanted was to lay in bed near her son so she could die at home and join her deceased husband. Unfortunately, as in Koch, the jury was unable to consider this defense, not because the court refused to instruct the jury on this defense, but instead

because Chris's trial counsel failed to offer the appropriate instructions. There is no conceivable legitimate defense strategy not to instruct the jury on this defense, particularly when it was the only defense presented. Therefore, counsel's performance was deficient. *Kyllo, supra*; *Thomas, supra*.

Chris was prejudiced by counsel's deficient performance. To convict Chris of second degree manslaughter the jury had to conclude that between May 16, and June 16, 2009, he acted with criminally negligence and thereby caused Ruby's death. CP 49 (Instruction 25, "to convict" for second degree manslaughter). Like the defendant in *Koch*, Chris explained to the law enforcement and the jury that he was aware of his mother's deteriorating health but chose not to provide more aggressive treatment, such as bringing care providers into the home or having her hospitalized, because Ruby said she did not want it. As such, as in *Koch*, the jurors must have relied on a finding of knowledge or recklessness to convict, as they were entitled to do under the court's instructions. CP 50 (Instruction 26, defining "criminal negligence"). As in *Koch*, without an instruction explaining that Chris was relieved of having to provide Ruby with treatment in the last month of her life if to do so would have constituted an assault, Chris "was not able to negate the subjective culpability element of knowledge or recklessness, which the State had to prove to convict him." 157 Wn. App. at 39-40. Therefore, this Court should reverse Chris's conviction.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR PROPOSING AN INSTRUCTION THAT WRONGLY STATED THE JURY MUST REACH A UNANIMOUS DECISION IN ORDER TO ANSWER "NO" ON THE SPECIAL VERDICT.

Defense counsel provided ineffective assistance in proposing a special verdict instruction that erroneously required the jury to be unanimous in order to answer the special verdict. *Strickland*, 466 U.S. at 685-86; *Thomas*, 109 Wn.2d at 229; U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. This Court should vacate the special verdict and remand for resentencing.

The offending instruction provides:

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 51 (Instruction 27).

By stating all 12 jurors must agree on an answer to the special verdict, Instruction 27 is an incorrect statement of the law. In 2003, the Supreme Court held unanimity was not required to answer "no" to whether the State proved a special finding capable of increasing the sentence. *State v. Goldberg*, 149 Wn.2d 888, 893, 895, 72 P.3d 1083 (2003). An instruction containing the same improper unanimity requirement was later given in

State v. Bashaw, 169 Wn.2d 133, 139, 234 P.3d 195 (2010) ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). 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. Goldberg, 149 Wn.2d at 893, 895; Bashaw, 169 Wn.2d at 146.

The State proposed Instruction 27. Supp CP __ (sub no. 58, State's Instructions to the Jury, 4/12/10). Defense counsel did too. CP 106. The invited error doctrine does not preclude review where, as here, defense counsel was ineffective in proposing the defective instruction. Kyllo, 166 Wn.2d at 861.⁴

The Supreme Court had not issued its decision in Bashaw at the time of Chris's trial. Bashaw, however, did not break new legal ground. Goldberg, decided well before Chris's trial, constituted controlling authority. Counsel has a duty to know the relevant law. Kyllo, 166 Wn.2d at 861.

⁴ Although not in the context of an ineffective assistance of counsel claim, this Court recently held a so-called Bashaw error may be raised for the first time on appeal. State v. Ryan, __ P.3d __, 2011 WL 1239796 (April 4, 2011). Ryan was charged with assault and harassment. As in Chris Wise's case, the State alleged an aggravating factor in support of an exceptional sentence and jurors were told they had to be unanimous in rejecting this factor. Slip op., at *1. Citing Bashaw, this Court concluded this error was grounded in due process and could be raised for the first time on appeal.⁴ Slip op., at *2.

And only legitimate trial strategy or tactics constitute reasonable performance. *Id.* at 869.

The Court in *Bashaw* easily resolved the unanimity question by relying on *Goldberg* as clear and binding precedent:

The jury instruction issue in this case is a narrow one: when a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final? We answered this question in *State v. Goldberg*, 149 Wash.2d 888, 72 P.3d 1083 (2003), and the answer is no.

Bashaw, 169 Wn.2d at 145 (emphasis added).

"The rule from *Goldberg*, 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. Here, defense counsel did not heed the rule announced in *Goldberg*. Instead, defense counsel proposed a pattern instruction that conflicted with binding Supreme Court precedent.

That the proposed instruction was based on WPIC 160.00 does not defeat an ineffective assistance claim. Pattern instructions are not immune from judicial scrutiny. *State v. Morgan*, 123 Wn. App. 810, 820 n.29, 99 P.3d 411 (2004). Such instruction is not immune from competent counsel's scrutiny either. Counsel is deficient in proposing a WPIC where proper

research would have indicated the pattern instruction was flawed. Kyllo, 166 Wn.2d at 868-69. Trial counsel should have objected to WPIC 160.00 rather than propose it because that pattern instruction conflicted with the Supreme Court's holding in Goldberg.

The Court of Appeals erroneous decision in Bashaw, which was on review when Chris's trial occurred, does not alter the conclusion that counsel was deficient. State v. Bashaw, 144 Wn. App. 196, 200-03, 182 P.3d 451 (2008) (holding unanimity required for special verdict), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010). Competent counsel knows a Supreme Court's holding is binding on the Court of Appeals. See 1000 Virginia P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (a decision by the Supreme Court is binding on all lower courts in the state). The Court of Appeals errs in not following directly controlling authority by the Supreme Court. 1000 Virginia P'ship, 158 Wn.2d at 578; State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). Division Three of the Court of Appeals in Bashaw apparently did not feel bound by the Supreme Court's clear holding in Goldberg. The Supreme Court subsequently rectified that plain error. Bashaw, 169 Wn.2d at 145-46. Defense counsel need not have waited for the Supreme Court to reject the Court of Appeals decision because binding Supreme Court authority in the form of Goldberg already existed.

Counsel's deficient performance prejudiced Chris. Given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." *Id.* As in Bashaw, "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." *Id.* As articulated by the Bashaw Court, "We can only speculate as to why this might be so. For instance, 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." *Id.* at 147-48.

When assessing the impact of instructional error due to defense counsel's deficient performance, reversal is automatic unless the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)).

An error is not harmless when the appellate court is unable to say from the record before it whether the defendant would or would not have

been convicted but for the error. Martin, 73 Wn.2d at 627. Prejudice in an ineffective assistance case is established when confidence is undermined in the outcome. Thomas, 109 Wn.2d at 226. This standard of prejudice is in accord with the definition of reversible error advanced by the Court in Martin. Rodriguez, 121 Wn. App. at 187 (prejudice analysis for ineffective assistance comparable to harmless error analysis). It is also in accord with the prejudice analysis advanced in Bashaw. See Bashaw, 169 Wn.2d at 147-48 ("We cannot say with any confidence what might have occurred had the jury been properly instructed.").

The special verdict, arrived at by means of an instruction that distorted the fact-finding process, should be vacated. Id. at 148. Because that is what occurred here, this Court should vacate the special verdict finding and remand for resentencing.

D. CONCLUSION

Trial counsel was ineffective for failing to propose an instruction supporting the defense theory of the case and this Court should therefore reverse Chris's conviction. In the alternative, because trial counsel was ineffective for proposing an erroneous instruction regarding the special verdict forms, Chris's exceptional sentence should be reversed.

DATED this 20th day of April, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65736-4-1
)	
CHRISTOPHER WISE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER WISE
DOC NO. 342909
REYNOLDS WORK RELEASE
410 4TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF APRIL, 2011.

x Patrick Mayovsky

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