

NO. 65952-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

EFRAIN BARRAZA,

Appellant.

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

The Honorable Steven J. Mura, Judge

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REPLY BRIEF OF APPELLANT

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DAVID B. KOCH  
Attorney for Appellant

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

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A. ARGUMENT IN REPLY

1. THE FLAWED UNANIMITY INSTRUCTION CAN BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

Under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and State v. Ryan, \_\_\_ Wn. App. \_\_\_, 2011 WL 1239796 (April 4, 2011), an instruction erroneously requiring unanimity to answer “no” on a special verdict form can be raised for the first time on appeal under RAP 2.5(a).

As discussed in Barraza’s opening brief, the defendant in Bashaw did not object to a similar erroneous instruction at trial. Yet, the Supreme Court addressed the issue for the first time on appeal and applied the “harmless beyond a reasonable doubt” standard reserved for constitutional error. See Brief of Appellant, at 8 (citing Bashaw, 169 Wn.2d at 147-148). Subsequently, in Ryan, this Court held that the issue, grounded in due process, is both manifest and constitutional. Ryan, at \*2.

Barraza may challenge the instructional error for the first time on appeal.

2. INSTRUCTION 24 IS INCORRECT.

Former RCW 9.94A.602 provides, “if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict

as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.” Citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980), the State argues the “whether or not” language requires that jurors unanimously determine the defendant was armed or unanimously determine the defendant was not armed during the crime. See Brief of Respondent, at 8.

Stephens, however, is a multiple acts case, and the court’s statement that “Washington requires unanimous jury verdicts in criminal cases” was made in that context. See Stephens, 93 Wn.2d at 190. Stephens does not address, much less resolve, whether a “no” answer must be unanimous for a special verdict. Both State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and Bashaw clearly hold that jurors need not be unanimous to answer “no.” Bashaw, 169 Wn.2d at 145-146; Goldberg, 149 Wn.2d at 893.

Moreover, there is nothing about the language of former RCW 9.94A.602 that changes the result. That statute does not indicate any particular level of juror unanimity for a “not” finding. Therefore, Bashaw and Goldberg control. See also Ryan, at \*2-\*3 (rejecting argument that precise language of exceptional sentence

statute requires “unanimity to render *any* verdict about aggravating circumstances, whether affirmative or negative.”).

3. THE STATE CANNOT DEMONSTRATE THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The State contends that because jurors unanimously found that Barraza used a deadly weapon (firearm) to commit attempted robbery and assault, the failure to instruct jurors they need not be unanimous to answer “no” on the firearm special verdicts is harmless beyond a reasonable doubt. See Brief of Respondent, at 12-13.

Bashaw says otherwise. The Supreme Court recognized that when jurors are told they must be unanimous, a juror may be hesitant to raise doubts or may abandon his position based on a perception he will not be able to sway *every* juror to agreement. But when jurors are informed that only one vote – a “no” vote – is sufficient to defeat an affirmative finding, that same juror is more likely to raise the doubt and stand his ground. Therefore, it is impossible to conclude the error in this case had no outcome on the jury’s verdict. See Bashaw, 169 Wn.2d at 148-149.

The State also argues that Barraza can be retried on the firearm enhancements without a new trial on the underlying

offenses. See Brief of Respondent, at 13-14. The State cites State v. Jackman, 156 Wn.2d 736, 132 P.2d 136 (2006), but Jackman deals with remand for an instructional error pertaining to the substantive criminal offenses. See Jackman, 156 Wn.2d at 740-741, 745. The State cites no authority for a retrial solely on firearm enhancements. Compare RCW 9.94A.537(2) (authorizing the retrial of aggravating circumstances when an exceptional sentence has been reversed on appeal).

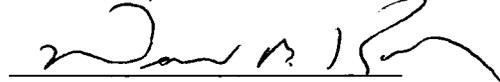
B. CONCLUSION

For the reasons discussed in Barraza's opening brief and above, this Court should vacate his firearm enhancements. Alternatively, as the State has conceded, Barraza's sentence on count I must be reduced so it does not exceed 120 months.

DATED this 13<sup>th</sup> day of June, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051  
Attorneys for Appellant

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**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 13<sup>TH</sup> DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE  
311 GRAND AVENUE, SUITE 201  
BELLINGHAM, WA 98227

[X] EFRAIN BARRAZA  
NO. 69256-065  
P.O. BOX 1000  
LEWISBURG, PA 17837

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF JUNE, 2011.

x *Patrick Mayovsky*

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